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In the Supreme Court of the United States

OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

LEON S. DAY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether persons seeking disability benefits under the Social Security Act are entitled by statute to reconsideration of their claims by the State agency and to an administrative hearing by the Secretary of Health and Human Services within the fixed periods of time imposed by the district court.

2. Whether, in the absence of statutory authorization, a court may require the Secretary to pay benefits from the Disability Insurance Trust Fund on an interim basis to persons who have not been found entitled to them, because judicially imposed deadlines for the adjudication of disability claims have not been met.

II

PARTIES TO THE PROCEEDING

The petitioner is the Secretary of Health and Human Services, Margaret M. Heckler. The respondents are Leon S. Day and Amedie Maurais, who are representatives of the following class of claimants for disability benefits under Title II of the Social Security Act, 42 U.S.C. (& Supp. V) 401 *et seq.*:

> All present and future Vermont residents seeking to secure Social Security disability benefits who, following an initial determination by the [Secretary] that no disability exists, experience an unreasonable delay in the handling of and/or issuance of decisions in reconsiderations and fair hearings.

Pet. App. 12a n.1.*

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* Respondents Day and Maurais had received an ALJ hearing and decision prior to the district court's certification of the class on June 14, 1979. The district court held that the case was not moot, however, concluding that the case fell within the exception recognized in *Gerstein* v. *Pugh*, 420 U.S. 103, 110 n.11 (1975), for situations in which the challenged condition is temporary and the issue as regards any particular class representative might become moot before the district court even could rule on the class certification issue (J.A. 84). See also *Sosna* v. *Iowa*, 419 U.S. 393, 402 n.11 (1975); *United States Parole Commission* v. *Geraghty*, 445 U.S. 388, 398-399 (1980). The district court also found that respondents Day and Maurais would be suitable representatives of the class in these circumstances (J.A. 83). See *United States Parole Commission* v. *Geraghty*, *supra*, 445 U.S. at 405-407.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 685 F.2d 19. The opinions of the district court (Pet. App. 12a-20a, 21a-31a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 10a) was entered on June 28, 1982, and a petition for rehearing was denied on September 17, 1982 (Pet. App. 11a). On December 7, 1982, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including February 14, 1983. The petition was filed on that date and was granted on April 25, 1983 (J.A. 207). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of Sections 205, 221, 223 and 1631 of the Social Security Act, 42 U.S.C. (& Supp. V) 405, 421, 423 and 1383; Sections 304(g) and 308 of the Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 94 Stat. 456, 458; and the recodified provisions of the Administrative Procedure Act, 5 U.S.C. 554(b), 555 (b) and 706, are reproduced in the Appendix, *infra*, 1a-19a.

STATEMENT

A. Background

1. *The Statutory and Regulatory Framework*

This case arises under Title II of the Social Security Act, which provides disability insurance benefits to an individual suffering a medically determinable physical or mental impairment if he is unable to do his previous work or to engage in any kind of substantial gainful work that exists in the national economy. 42 U.S.C. 423(d)(1)(A) and (2)(A). See *Heckler* v. *Campbell*, No. 81-1983 (May 16, 1983), slip op. 1. These benefits are paid out of the Federal Disability Insurance Trust Fund in the Treasury, which is funded by payroll taxes. 42 U.S.C. (Supp. V) 401(b). Disability benefits also are payable under the Supplemental Security Income (SSI) program established by Title XVI of the Social Security Act, 42 U.S.C. (& Supp. V) 1381 *et seq.* See 42 U.S.C. 1382(a)(2)(B) and 1382c(a)(3).

The disability programs established by Titles II and XVI "are of a size and extent difficult to comprehend." *Richardson* v. *Perales*, 402 U.S. 389, 399 (1971). In fiscal year 1981 alone, approximately 2.3 million claims for disability benefits were filed under the two Titles. *Heckler* v. *Campbell*, *supra*, slip op. 3 n.2. To provide for an orderly determination of the eligibility of this number of individuals, Congress and the Secretary of Health and Human Services (HHS) have prescribed in meticulous detail a multi-stage procedure for the administrative con-

sideration of disability claims. Should it be determined at any stage of this procedure that an individual is eligible for benefits, he is entitled to retroactive payments for the period of his eligibility. 42 U.S.C. (& Supp. V) 404 and 423(b); see *Mathews* v. *Eldridge*, 424 U.S. 319, 339 (1976).

a. Under the Title II program, a State agency first determines whether a claimant has a disability and the date when the disability began or ceased. 42 U.S.C. (Supp. V) 421(a); 20 C.F.R. 404.1503. If the claimant is dissatisfied with this determination, he may request a de novo reconsideration by the State agency. 20 C.F.R. 404.907-404.921. Additional evidence often will be submitted at the reconsideration stage, including examination of the individual by a consulting physician. See Pet. App. 23a; *Richardson* v. *Perales*, *supra*, 402 U.S. at 393-394; *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 338 n.20. In fiscal year 1982, more than 503,000 requests for reconsideration were processed.[1]

In recent years, Congress has enacted two additional procedural requirements at the reconsideration stage. First, in the Social Security Disability Amendments of 1980 (Pub. L. No. 96-265, Section 305(a), 94 Stat. 457), Congress amended 42 U.S.C. 405(b) to require that in any disability case in which the State agency's decision is adverse to the claimant, the decision must contain an easily understandable discussion of the evidence and the reasons for the determination of ineligibility. Although Congress recognized that such individualized notice would consume more resources and might increase processing time, it concluded that requiring the State examiner to formulate written reasons for his decision would improve the adjudicatory process and that the claimant might be less likely to appeal if he understood those reasons.

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[1] Office of Hearings and Appeals, U.S. Dep't of Health and Human Services, *Key Workload Indicators (FY May 1983)* 15 (June 29, 1983) ("*Key Workload Indicators*"). We have lodged a copy of the May 1983 edition of the monthly *Key Workload Indicators* with the Clerk of this Court.

S. Rep. No. 96-408, 96th Cong., 1st Sess. 56-57 (1979); H.R. Rep. No. 96-100, 96th Cong., 1st Sess. 12 (1979).

Second, in 1982 Congress provided that, beginning no later than January 1, 1984, whenever a State agency initially determines that a person previously entitled to benefits no longer is under a disability and that his benefits therefore should be terminated, the person must be afforded an evidentiary hearing at the reconsideration stage.[2] Moreover, as a temporary measure, the 1982 legislation authorized the payment of interim benefits, pending a final decision after a hearing in HHS (see page 5, *infra*), to a person whom the State agency has found no longer to be disabled.[3] Congress did not, however, provide for an additional hearing at the reconsideration stage or interim benefits for individuals whose *new* applications for disability benefits were denied by the State agency at the initial determination stage.

b. When it enacted the disability program in 1954, Congress authorized the Secretary, on his own motion, to review and overturn any determination by a State agency in favor of the claimant. 42 U.S.C. (1952 ed. Supp. II) 421(c); 68 Stat. 1082. Until 1972, the Social Security Ad-

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[2] Pub. L. No. 97-455, Section 4, 96 Stat. 2499, adding a new paragraph (2) to Section 205(b) of the Social Security Act, to be codified at 42 U.S.C. 405(b)(2).

[3] Pub. L. No. 97-455, Section 2, 96 Stat. 2498, adding a new Subsection (g) to Section 223 of the Act, to be codified at 42 U.S.C. 423(g). The authorization for interim benefits applies only to initial determinations in disability benefit termination cases made on or after (or pending on administrative review on) the effective date of the Act (January 12, 1983) but before October 1, 1983. Benefits may continue to be paid in such cases after October 1, 1983 until the HHS Administrative Law Judge (ALJ) renders his decision or until June 1984, whichever is earlier. These benefits are subject to recoupment if the initial determination that benefits should be terminated is affirmed on appeal, although recoupment may be waived in accordance with 42 U.S.C. (& Supp. V) 404. A bill has been introduced in the Senate to make the interim benefits authorization permanent in benefit cessation cases. S.476, 98th Cong., 1st Sess. § 5 (1983).

ministration (SSA) in HHS reviewed the majority of State determinations. In 1972, as a result of a growing workload and efforts to reduce costs, SSA switched to a sample review of only 5% of the State agencies' determinations in favor of the claimant, and even those cases were reviewed only after the State's determination had gone into effect and payment of benefits had begun. Over the next few years, however, Congress became concerned that the quality and uniformity of State decisions were deteriorating because of an undue emphasis on expediting the claims process in response to the backlog of cases. See S. Rep. No. 96-408, *supra*, at 52-56; H.R. Rep. No. 96-100, *supra*, at 8-10. Consequently, Congress included in the Disability Amendments of 1980 a requirement that, beginning in fiscal year 1983, the Secretary must review 65% of all State determinations in favor of the claimant before those determinations are put into effect. 42 U.S.C. (Supp. V) 421(c)(2) and (3). The 1980 amendments also provided for the Secretary to review State determinations that are unfavorable to the claimant. 42 U.S.C. (Supp. V) 421(c)(1).[4]

c. If the final State agency decision after reconsideration is adverse to the claimant, he is entitled to an evidentiary hearing by an Administrative Law Judge (ALJ) in HHS. 42 U.S.C. (Supp. V) 405(b)[5]; 42 U.S.C. (Supp. V) 421(c); 20 C.F.R 404.929-404.961. If the claimant is dissatisfied with the decision rendered after the hearing, he may take an appeal to the Appeals Council in HHS. 20 C.F.R. 404.967-404.983. The Secretary also was directed by Section 304(g) of the Disability Amendments of 1980 (94 Stat. 456) to institute a program for the Appeals Council to review ALJ decisions on

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[4] The Secretary actually had instituted such reviews in some cases prior to 1980. At the times relevant to this case, for example, certain State agency reconsiderations of decisions terminating benefits to previously eligible individuals were reviewed by SSA in Baltimore before they became final (Pet. App. 24a).

[5] We shall delete "Supp. V" in future references to this Section.

its own motion, because of what Congress perceived to be a lack of uniformity among ALJ decisions and between decisions rendered by ALJs and the State agencies. H.R. Conf. Rep. No. 96-944, 96th Cong., 2d Sess. 57-58 (1980); S. Rep. No. 96-408, *supra*, at 53.

After a claimant has exhausted his administrative remedies in this fashion,[6] he may seek judicial review of a final denial of benefits pursuant to 42 U.S.C. (Supp. V) 405(g). Under 42 U.S.C. 405(i), payment of disability benefits may be made out of the Disability Trust Fund upon a final decision of the Secretary or a final judgment of a court that a person is entitled to such benefits. Pursuant to a specific directive added by the Disability Amendments of 1980, once a person has been found by a State agency, the Secretary, or a court to be disabled, his case thereafter must be reviewed periodically to determine whether he still is under a disability. See 42 U.S.C. (Supp. V) 421(h).[7]

2. *The Administrative Law Judges and the Hearing Process*

a. The hearings provided for in 42 U.S.C. 405(b) are conducted by a corps of ALJs in the Office of Hearings and Appeals (OHA) in SSA. 20 C.F.R. 404.929. The cost of the ALJs, their support staffs, and other expenses of SSA, as well as the State agencies' costs associated with the disability program, are paid out of the Trust Funds in "such amounts as the Congress may deem appropriate" (42 U.S.C. (Supp. V) 401(g)(1)(A); see also 42 U.S.C. (Supp. V) 421(e)). To implement

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[6] Similar procedures are followed in SSI disability cases under Title XVI of the Act. See 20 C.F.R. Part 416 subpart N.

[7] In general, this review must occur at least once every three years. 42 U.S.C. (Supp. V) 421(h). In 1983, Congress authorized the Secretary, on a State-by-State basis, to modify the requirement for continuing disability reviews every three years if the backlog of such reviews, the number of new applications, and staffing levels in a State so warrant. See Pub. L. No. 97-455, Section 3, 96 Stat. 2499.

the quoted provision, Congress specifies in annual appropriation acts the maximum amount of money to be made available for administering the Social Security programs. See, *e.g.*, Pub. L. No. 95-480, 92 Stat. 1567, 1582.

The total number of ALJ hearings requested annually under all Social Security programs increased from approximately 72,000 in fiscal year 1973 to more than 320,000 in fiscal year 1982.[8] The vast majority of these hearing requests were in disability cases.[9] HHS has projected that hearing requests will reach 379,000 in fiscal year 1983.[10] This increase will result in part from the requirement imposed by Congress in 1980 that the Secretary provide for a periodic review of the eligibility of individuals who are receiving disability benefits (see page 6, *supra*).[11]

To meet this greatly expanded workload, the number of ALJs in HHS has been increased from 420 in fiscal year 1973 to approximately 800 at the present time. The support staff per ALJ more than doubled during this period, and, on the average, there are now more than four support personnel for each ALJ. The result of these and other administrative initiatives by the Secretary has been to increase the average number of dispositions per

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[8] *Key Workload Indicators*, *supra* note 1, at 1.

[9] In fiscal year 1980, for example, more than 95% of all hearing requests involved Title II or Title XVI disability claims. Staff of the House Comm. on Ways and Means, 97th Cong., 1st Sess., *Social Security Hearings and Appeals: Pending Problems and Proposed Solutions* 2 (Comm. Print 1981).

[10] Social Security Administration, U.S. Dep't of Health and Human Services, *1983 Annual Report to Congress* 49 (May 1983). Statistics for the first eight months of fiscal year 1983 in fact reflect a substantial increase. Hearing requests averaged approximately 26,725 per month in fiscal year 1982 but approximately 29,570 per month during the first eight months of fiscal year 1983—including an all-time record of 33,112 filed in March 1983 and 31,471 and 32,264 filed in April and May of 1983, respectively. *Key Workload Indicators*, *supra* note 1, at 1.

[11] See Comm. Print, *supra* note 9, at 1.

ALJ each month from 14 in 1973 to 34 in 1982. Currently, an ALJ processes an average of more than 1.5 cases each working day.[12]

Between 1973 and 1982, the nationwide average time from the date on which an evidentiary hearing was requested to the date on which the ALJ rendered his decision varied between a high of 288 days in fiscal year 1976, when *Mathews* v. *Eldridge* was decided (see 424 U.S. at 341-342), to a low of 151 days in 1979. In fiscal year 1982, the average processing time was 174 days, the same as it had been in 1973,[13] thereby indicating that SSA has been able to absorb the more than fourfold increase in its hearing caseload since 1973 without extending the time needed to conduct such hearings beyond what it was a decade ago. Nevertheless, because of the continually expanding caseload, the number of pending cases had grown to more than 152,000 at the end of fiscal year 1982 and more than 171,000 at the end of May 1983, an all-time record. And the average number of cases pending per ALJ stood at 203 in September 1982 and 221 in May 1983, another all-time record.[14]

b. The Secretary has adopted detailed procedures governing the scheduling and conduct of hearings by ALJs. A request for an ALJ hearing is assigned to the Hearing Office of OHA responsible for the region in which the claimant resides. The Hearing Office staff is responsible for ensuring that the procedural prerequisites to a hearing have been satisfied and for procuring the case file from the appropriate office of SSA. See Social Security Administration, U.S. Dep't of Health and Human Services, *Office of Hearings and Appeals Hand-*

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[12] *Key Workload Indicators*, *supra* note 1, at 1.

[13] *Key Workload Indicators*, *supra* note 1, at 1. The processing time has fluctuated in fiscal year 1983 between a low of 177 days in October 1982 and a high of 189 days in January 1983. For cases decided in April and May 1983, the average processing time was 185 days. *Ibid.*

[14] *Key Workload Indicators*, *supra* note 1, at 1.

book §§ 2-310 to 2-319 (Apr. 1982) ("*OHA Handbook*"). When those materials are assembled, the case is assigned to an ALJ in rotation insofar as possible, taking into account individual ALJ dockets. *Id.* §§ 1-313, 1-314. At this point, jurisdiction over the case passes to the ALJ. *Id.* § 1-310.

The ALJ is required to look fully into the issues and facts in the case, even if the claimant does not adequately present them himself. 20 C.F.R. 404.944. Accordingly, the ALJ's staff must conduct a prehearing workup of the case, in which they identify the issues for the hearing, review the evidence in the file to determine whether additional material is required, isolate conflicts in the evidence, propose exhibits for the record, determine whether material from any prior hearings should be transcribed or included, consider whether a vocational expert or medical advisor should be present at the hearing, and decide whether a prehearing interview or conference would be appropriate. *OHA Handbook*, *supra*, at §§ 1-300, 1-344, 1-349, 1-620. It then may be necessary for the ALJ, either before or after the hearing (20 C.F.R. 404.944), to request additional medical evidence from the claimant, the State agency, or a physician who recently has examined the claimant or performed a consultative examination for the ALJ (*OHA Handbook*, *supra*, at §§ 1-510 *et seq.*, 1-520, 1-521, 2-326-40, 2-330, 2-500 *et seq.*). The ALJ also may request vocational testimony from an expert (*id.* §§ 1-530 *et seq.*), earnings information from various sources (*id.* § 1-542), and information about the claimant's age, citizenship, or similar matters from other agencies (*id.* §§ 1-544, 1-545).

The ALJ is responsible for scheduling the hearing within the framework of priorities established by SSA. 20 C.F.R. 404.936(a); *OHA Handbook*, *supra*, at § 2-350. Consistent with "[t]he administrative objective * * * that a hearing be held as soon as possible after the [request for a hearing] is filed" (*id.* § 1-360), the *OHA Handbook* states that "[a] hearing date should be selected as soon

as the prehearing workup is completed; all outstanding evidence requested by the ALJ has been received; and it is clear that the request cannot be disposed of without a hearing" (*id.* § 2-351). The *OHA Handbook* provides that, as a general matter, cases are to be scheduled for a hearing in the order in which the hearing requests were received. However, the ALJs also must coordinate the scheduling of hearings in various locations. *Id.* §§ 1-313, 2-351. The *OHA Handbook* further provides that SSI nondisability cases must be expedited, as required by the Act. 42 U.S.C. 1383(c)(2). Finally, by *OHA Handbook* Interim Circular No. 138, dated March 31, 1982, the Commissioner of Social Security directed that hearings to review a State agency's decision to terminate benefits are to be given priority over hearings to review a State agency's denial of an initial application for benefits.

B. The Proceedings in This Case

1. *The District Court's Decision*

This class action was filed by respondent Day in the United States District Court for the District of Vermont on November 15, 1978. Respondents alleged that an unreasonably long period of time elapsed in Title II disability cases in Vermont between a claimant's request for reconsideration and the State agency's decision on reconsideration and between a request for an ALJ hearing and the convening of the hearing (Pet. App. 12a-13a & n.1).[15]

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[15] Respondent Day, who had been receiving benefits pursuant to a prior finding of disability, was found by the State agency no longer to be disabled. He requested reconsideration of that determination on December 21, 1977, and his claim was denied after reconsideration on June 6, 1978, 167 days later. Day then requested an ALJ hearing, which was held on December 4, 1978, 173 days after he requested the hearing and several weeks after he filed this suit. On January 17, 1979, the ALJ issued a decision reaffirming the decision to terminate his disability benefits (Pet. App. 13a-14a).

Respondent Maurais, who intervened in this suit on December 1, 1978 (Pet. App. 14a), also had been receiving benefits pursuant to

a. On December 28, 1978, the district court granted partial summary judgment for respondents with respect to the timing of ALJ hearings (Pet. App. 12a-20a). Relying on the Second Circuit's prior decisions in *White* v. *Mathews*, 559 F.2d 852 (1977), cert. denied, 435 U.S. 908 (1978), and *Barnett* v. *Califano*, 580 F.2d 28 (1978), the district court held that the provision in 42 U.S.C. 405(b) for the Secretary to afford a claimant "reasonable notice and opportunity for a hearing" requires that the ALJ hearing be conducted within a "reasonable" time after it is requested (Pet. App. 15a).[16]

The district court did not question the Secretary's submission that "SSA has made a good faith effort to meet the needs of claimants for disability benefits while protecting the fiscal integrity of its program with the limited resources available" (Pet. App. 17a). Indeed, the court agreed that "SSA has made admirable strides in reducing the average length of delay experienced by claimants a few years ago" (*ibid.*). Nevertheless, based solely on evidence that 43% of Vermont residents who requested hearings on their Title II disability claims in 1978 waited more than 90 days for their hearings, the

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a prior determination of disability. In April 1978, Maurais was notified of the State agency's determination that his disability had ceased. He requested reconsideration of that initial determination, and an adverse reconsideration decision was rendered on January 4, 1979, 215 days after his request. Maurais then requested an ALJ hearing, and that hearing was held 65 days later. Maurais' benefits were reinstated following the hearing (Pet. App. 14a).

[16] In *White* v. *Mathews*, *supra*, a class action by Title II disability claimants in Connecticut, the court of appeals had held that the average period of 211.8 days between a hearing request and the ALJ's decision was not "reasonable" and ordered the Secretary to reduce that time period for Connecticut claimants to 120 days. 559 F.2d at 858-860. In *Barnett* v. *Califano*, *supra*, the court of appeals had held that the period of 6 or 7 months that ordinarily elapsed in Title XVI disability cases in Vermont was unreasonable and ordered that hearings be held within 90 days. 580 F.2d at 31-33.

court found that a substantial number of claimants had not had a hearing within a reasonable time (Pet. App. 17a). The court therefore ordered that ALJ hearings be held within 90 days of a request, subject to certain exceptions for delays caused by the claimant (*id.* at 33a-34a).

b. On August 19, 1981, the district court granted summary judgment for respondents on the reconsideration aspect of the case as well (Pet. App. 21a-31a). Although 42 U.S.C. 405(b) does not mention the reconsideration stage, the court explained that reconsideration by the State agency is an administrative prerequisite to an ALJ hearing and that unreasonable delays in reconsideration therefore undercut the right to an ALJ hearing within a "reasonable" time (Pet. App. 27a).

The district court found that in a sample of 77 Title II disability cases in Vermont processed between 1977 and 1980, reconsideration time ranged between 17 and 251 days, with a mean time of 68 days. Approximately 35% of these reconsideration cases took more than 90 days to process. The court acknowledged that "the reconsideration process is often time consuming and complex" (Pet. App. 25a) because of the need to locate and procure the claimant's folder, update existing evidence or gather new evidence, arrange for a consultative examination where indicated, perform a vocational evaluation, prepare notices, and allow time for quality control reviews both by the State agency and by SSA (*id.* at 23a-24a, 28a-29a). The court also acknowledged that SSA should retain flexibility to implement the additional notice and quality review provisions required by the Disability Amendments of 1980 (Pet. App. 29a & n.8; see pages 3, 5, *supra*). But the court concluded that a claimant should not have the timing of his hearing affected by what it termed "inefficient agency procedures" or "unnecessarily lengthy" internal quality control checks (*id.* at 28a). Against this background, the court held that the passage of more than 90 days between a request for reconsideration and the

decision on reconsideration was not "reasonable" (*id.* at 28a-29a), and it ordered that reconsideration be accomplished within a 90-day period, except where the time consumed in excess of that amount is attributable to the claimant (*id.* at 33a).

c. The district court also ordered the Secretary to pay interim disability benefits to any claimant who has not received a reconsideration determination or hearing within 180 days of the request for reconsideration or has not received an ALJ hearing within 90 days of a hearing request, even though the claimant has not yet been found entitled to such benefits by the State agency or the Secretary. These benefits are made subject to recoupment by the Secretary if the claimant ultimately is determined not to have been eligible to receive them (Pet. App. 30a-31a, 34a-35a).[17]

2. *The Court of Appeals' Decision*

The court of appeals affirmed the district court's decision in all respects (Pet. App. 1a-9a). The court of appeals expressed its "sympath[y] with the severe problems that beset SSA" and its "understand[ing] that [the district court's] decision may have a significant impact on [SSA's] operations" (*id.* at 6a). But the court nevertheless concluded that judicially imposed timetables were appropriate for the processing of the " 'flood of claims' " confronting SSA (*ibid.*, quoting *White* v. *Mathews*, *supra*, 559 F.2d at 859).

The court of appeals "share[d] the First Circuit's concern that 'if the Secretary's resources truly are inadequate to the task, the more litigious of the applicants may gain an advantage over the less assertive' " (Pet.

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[17] Because the district court found violations of the Social Security Act, it did not reach respondents' arguments that the challenged practices violate the Due Process Clause of the Fifth Amendment and the Administrative Procedure Act (Pet. App. 15a, 26a). The court of appeals likewise did not consider those arguments (*id.* at 9a n.8).

Caswell, that it should not be deterred from awarding

App. 7a, quoting *Caswell* v. *Califano*, 583 F.2d 9, 17 (1st Cir. 1978)). The court concluded, however, again quoting relief to respondents by " 'the alleged inability of the [Secretary] fully to meet his obligations to others' " (*ibid.*). The court of appeals also recognized "that in the last five years Congress has involved itself heavily in the administration of this Act" and that "Congress has refused to impose its own deadlines." But the court viewed Congress' failure to impose deadlines as perhaps suggesting that Congress is satisfied that the problem of the timing of ALJ hearings is being handled effectively by the courts (Pet. App. 7a). In addition, the court of appeals approved the district court's extension of its holding in *White* v. *Mathews*, *supra*, to the processing of claims by State agencies at the reconsideration stage (Pet. App. 7a-8a).

Finally, the court of appeals concluded that the provisions of 42 U.S.C. 405(i) limiting payments from the Trust Fund to situations in which the Secretary or a court has found the claimant entitled to benefits do not " 'exclud[e] the possibility of interim payments ordered by a court exercising its remedial power' " (Pet. App. 8a, quoting *White* v. *Mathews*, *supra*, 559 F.2d at 861). The court rejected the contention that its approval of interim benefits in *White* v. *Mathews* was undermined by this Court's subsequent decision in *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), explaining that the award of interim payments at issue here flows from the "district court's inherent powers to fashion a remedy" (Pet. App. 8a-9a).

SUMMARY OF ARGUMENT

The decision of the court of appeals, imposing arbitrary time limitations on the administrative adjudication of disability claims under the Social Security Act, represents an unwarranted judicial intrusion into an area carefully considered and pervasively regulated by Congress and the Secretary of Health and Human Serv-

ices. The Court's ruling is without statutory basis and, indeed, is inconsistent with Congress' repeated refusal to include processing deadlines in disability cases. If upheld, the ruling will substantially disrupt the disability program and will impair the accuracy and fairness of administrative decision-making.

I

A. There is no requirement in 42 U.S.C. 405(b) that hearings on claims for benefits under Title II of the Social Security Act be conducted within a fixed period of time. In contrast, the parallel provision for hearings under the Supplemental Security Income (SSI) program in Title XVI of the Act requires that a decision be rendered within 90 days of a request for a hearing. 42 U.S.C. (Supp. V) 1383(c)(2). This demonstrates that when Congress wants to impose hearing deadlines, it expressly so provides. Moreover, *disability* cases are specifically excluded from the hearing deadline even under the SSI program, thereby indicating Congress' determination that fixed processing times are especially inappropriate in this category of cases. Congress likewise excluded disability cases from the provision in 42 U.S.C. 405(q) for expedited benefit payments, because a lengthy investigation often is required in such cases.

In addition, Congress repeatedly has refused to impose deadlines on the hearings by Administrative Law Judges (ALJs) because of its concern that arbitrary time limitations could adversely affect the thoroughness and accuracy of their decisions. Indeed, in the Disability Amendments of 1980, Congress directed the Secretary to recommend appropriate time limits that would take these concerns into account. But Congress did not amend 42 U.S.C. 405(b) to impose deadlines after the Secretary submitted his report, even though it did amend 42 U.S.C. 405(b) in 1982 to expedite the opportunity for a hearing in another way—by providing for a hearing at the State agency reconsideration stage in benefit termination cases.

Given Congress' extensive attention to the question and persistent refusal to impose deadlines, the courts below erred in doing so.

B. Whether existing procedures afford a "reasonable • • • opportunity for a hearing" under 42 U.S.C. 405(b) presents a question of statutory interpretation and therefore requires a consideration of congressional intent and of the statutory scheme governing the review of disability claims. Processing times that are an entrenched feature and foreseeable consequence of the manner in which Congress and the Secretary have jointly implemented the Social Security Act over the last decade cannot properly be held to violate that Act.

Thus, in concluding that any period of time in excess of 90 days for holding an ALJ hearing is not "reasonable" except where the claimant delays the proceedings, the court below focused too narrowly on the claimant's interest in expedited ben fit determinations to the exclusion of other considerations Congress has deemed relevant. For example, the ALJ is required to look fully into the issues in the case, and Congress repeatedly has stressed that the interest in speedy resolution of claims does not outweigh the need for thoroughness and accuracy. The timing of hearings also must accommodate the need for quality review of State agency and ALJ decisions, additional procedural steps Congress has mandated, and the limited personnel resources available. The court below could not properly second-guess the manner in which Congress and the Secretary have balanced these competing concerns by enforcing its own view of what would be an appropriate time within which to resolve disability claims.

C. The Administrative Procedure Act does not support the judgment below. Under 5 U.S.C. 555(b), an agency must conclude a matter pending before it "within a reasonable time," but also "[w]ith due regard for the convenience and necessity of the parties." The latter phrase indicates that an agency's workload and procedures must

be considered in scheduling hearings. Moreover, the question of what constitutes a "reasonable time" for purposes of Section 555(b) must take into account all relevant factors under the substantive program involved, including resource limitations, the complexity of scheduling a vast number of hearings, and the need for thorough and accurate decision-making.

Under 5 U.S.C. 706(1), a reviewing court may compel agency action "unreasonably delayed." This phrase connotes an intentional retarding of action from its normal course, and thus does not describe the Secretary's orderly disposition of the enormous backlog of disability cases under established procedures and resources limitations. The legislative history and the Attorney General's contemporaneous interpretation of the APA confirm that Section 706(1) does not justify the imposition of program-wide deadlines where the agency is proceeding diligently and in good faith.

D. The courts below erred in imposing deadlines on the reconsideration of claims by State agencies. Congress consistently has refused to enact time limitations governing this stage of the administrative proceedings, which are not under the Secretary's day-to-day control. In addition, in the Disability Amendments of 1980, Congress left to the Secretary's discretion the question whether processing time limits should be established for State agencies.

II

The portion of the judgment below requiring payment of interim benefits to individuals whose claims are not processed within judicially fashioned deadlines fails to respect the conditions Congress has prescribed for charging the public treasury. *Schweiker* v. *Hansen*, 450 U.S. 785 (1981). Congress has authorized payments from the Trust Fund only upon a "final decision" by the Secretary or a "final judgment" by a court that an individual actually is "entitled" to disability benefits because he is under a disability and satisfies other eligibility criteria.

42 U.S.C. (& Supp. V) 405(i), 423(a)(1). Moreover, Congress has specifically addressed the question of when interim benefits should be paid pending completion of the administrative process, but it has not chosen to authorize the payment of interim benefits solely because of the passage of time in processing claims for disability benefits.

ARGUMENT

I. THE DISTRICT COURT WAS NOT AUTHORIZED BY THE SOCIAL SECURITY ACT OR THE ADMINISTRATIVE PROCEDURE ACT TO REQUIRE THAT REQUESTS FOR A HEARING AND RECONSIDERATION IN DISABILITY CASES BE ACTED UPON WITHIN A FIXED PERIOD OF TIME

As this Court has recently observed, "[t]he Social Security hearing system is 'probably the largest adjudicative agency in the western world.'" *Heckler* v. *Campbell*, *supra*, slip op. 3 n.2, quoting J. Mashaw, et al., *Social Security Hearings and Appeals*, at xi (1978). Congress and the Secretary are confronted with a task of unprecedented difficulty in fashioning procedures for the adjudication of the vast numbers of claims and requests for review submitted annually under the nationwide disability programs. In doing so, they must seek to accommodate a variety of goals—accuracy, fairness, uniformity, efficiency, and economy—that often may conflict with the goal upon which the court of appeals narrowly focused: completing the review as quickly as possible.[18]

Given the difficulty of the task, it is not surprising that few subjects have commanded such consistent attention by Congress and the Secretary as the administration of the disability program, including the persistent backlog

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[18] See J. Mashaw, *Bureaucratic Justice* 187 (1983); Note, *Judicial Resolution of Systemic Delays in Social Security Hearings*, 79 Colum. L. Rev. 959, 971 (1979); Dixon, *The Welfare State and Mass Justice: A Warning from the Social Security Disability Program*, 1972 Duke L. J. 681, 687-688.

of pending cases and the time required to process claims. But although Congress has amended the Act in a number of other respects to improve procedures for adjudicating claims, it repeatedly has rejected proposals that disability claims be ruled upon within a fixed time. This refusal stems principally from Congress' concern that such deadlines would undermine the goal of assuring a thorough and accurate evaluation of disability claims, which protects the interests of the claimant and the public.

The court of appeals' imposition of fixed deadlines that Congress and the Secretary have declined to adopt is without statutory basis, inconsistent with the statutory scheme, disruptive of the disability program, and likely to lead to inferior rather than improved decision-making. We submit that the Secretary fully satisfies her obligation under 42 U.S.C. 405(b) to provide claimants a "reasonable * * * opportunity for a hearing" by diligently processing more than 300,000 hearing requests annually in accordance with established procedures and priorities, the validity of which are not challenged here, and within the limits of available resources.

A. The Imposition Of Fixed Hearing Deadlines Is Inconsistent With The Text And Legislative History Of The Social Security Act

Congress did not include in 42 U.S.C. 405(b) fixed deadlines for holding hearings on claims for benefits under Title II of the Social Security Act. Indeed, there is no mention whatever of the timing of hearings in the text or legislative history of 42 U.S.C. 405(b) as originally enacted.[19] That Section simply provides, in the most

[19] See S. Rep. No. 728, 76th Cong., 1st Sess. 42 (1939); S. Rep. No. 734, 76th Cong., 1st Sess. 51 (1939). The Social Security Board's description of the hearing process soon after 42 U.S.C. 405(b) was enacted in 1939 recited various "Legal Considerations" regarding the nature of the hearing required by 42 U.S.C. 405(b), but, likewise, did not mention the question of timing. See Attorney General's Committee on Administrative Procedure, *Administrative Procedure in Government Agencies*, S. Doc. No. 10, 97th Cong., 1st

general terms, that the Secretary shall afford "reasonable notice and opportunity for a hearing" if the Secretary initially denies a claim. The courts below nevertheless found in this language an implicit authorization for the imposition of program-wide time limits on the processing of disability claims generally. This holding is plainly wrong.

The application to this case of the phrase "reasonable * * * opportunity for a hearing" in 42 U.S.C. 405(b) presents solely a question of statutory interpretation: what, if anything, did Congress intend the Social Security Act to require with respect to the timing of ALJ hearings in disability cases? Whatever else Congress may have intended in this regard, it is unambiguously clear that Congress did *not* intend to impose fixed deadlines on the adjudication of disability claims. As we explain in this section of the Brief, Congress repeatedly has rejected such deadlines because they could prevent the thorough and accurate review of claims. The courts below could not properly circumvent this congressional judgment by reading into the general phrase "reasonable * * * opportunity for a hearing" their own notion of what would be a "reasonable" period of time within which to conduct a hearing—90 days, under the decision in this case—and then incorporating that notion into a remedial decree that binds the Secretary in disability cases generally.

1. The absence in 42 U.S.C. 405(b) of fixed deadlines or even of any mention of the timing of hearings under Title II is in marked contrast to the parallel provision for hearings under the SSI program. See 42 U.S.C. (&

Sess. (Pt. 3) 38-40 (1941). Under a separate heading entitled "Requirements of the Administrative Task," the Board did cite expeditious processing as an important feature of the review process, in the interests of efficiency, human needs, and public relations. *Id.* at 37. The Board also recognized, however, the strong countervailing interests in fairness, uniformity, and accuracy of determinations (*ibid.*), which account for much of the time consumed in processing disability cases.

Supp. V) 1383(c). That Section, like 42 U.S.C. 405(b), provides that the Secretary shall provide "reasonable notice and opportunity for a hearing" on a claim for benefits. 42 U.S.C. (Supp. V) 1383(c)(1). But Congress further specified with respect to SSI nondisability claims that the "[d]etermination on the basis of such hearing * * * shall be made within ninety days after the individual requests the hearing * * *." 42 U.S.C. 1383(c)(2). Thus, Congress has demonstrated in the Social Security Act itself that when it intends to impose fixed deadlines on the Secretary's processing of claims, it has expressly so specified. "In light of the statute's precisely drawn provisions," the fact that Congress did not include a fixed deadline in the parallel hearing provision in 42 U.S.C. 405(b) provides "persuasive evidence" that Congress "deliberately intended" not to impose deadlines through that Section. *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982). Indeed, the fact that 42 U.S.C. (Supp. V) 1383(c)(1) contains the identical phrase "reasonable notice and opportunity for a hearing," and yet Congress found it necessary to address the question of timing of SSI hearings in a separate paragraph (42 U.S.C. 1383(c)(2)), confirms that Congress did not intend the quoted phrase to address the scheduling of hearings on a program-wide basis. See *Lehman* v. *Nakshian*, 453 U.S. 156, 162-163 (1981).

2. Congress' decision to impose a hearing deadline under Title XVI but not Title II of the Act reflects the fact that eligibility for SSI benefits, unlike benefits under Title II, is based on need. 42 U.S.C. 1382(a). Compare *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 340-342. Congress reasonably could conclude that the hardship caused by an extended waiting period in the processing of claims under Title XVI therefore would be greater than under Title II. It is significant, however, that Congress nevertheless expressly excepted *disability* cases from the 90-day hearing deadline even under the SSI program (see 42 U.S.C. 1383(c)(2)), presumably because of the complex-

ity of the disability determination. This exception makes even clearer that Congress did not intend courts to impose fixed deadlines on the processing of disability claims under Title II, where the claimant's countervailing interest in a speedy disposition weighs less heavily.

In fact, Congress made just such a judgment regarding Title II disability claims in 1968, when it added Subsection (q) to 42 U.S.C. 405 to authorize expedited payment of benefits to certain individuals pending a final decision on their claims. Pub. L. No. 90-248, Section 171(a), 81 Stat. 876. Under 42 U.S.C. 405(q), a claimant may begin to receive such benefits once 90 days have passed without a final decision following the submission of all evidence requested by the Secretary, if the Secretary determines that the individual has made a prima facie showing of entitlement. See 20 C.F.R. 404.1810. The Senate Report on the measure stressed, however, that "the Secretary should not be forced into making doubtful payments merely because of the passage of time" (S. Rep. No. 744, 90th Cong., 1st Sess. 106 (1967)). Consistent with this view, Congress excluded Title II *disability* cases from the provision for expedited payments. 42 U.S.C. 405(q)(5). The Senate Report explained:

> The process of making disability determinations is significantly different from the retirement and survivors insurance claims process. In the disability process State vocational rehabilitation agencies are involved importantly in the making of the decision and in borderline cases lengthy and extensive development of facts of a medical nature is often required. Because the Secretary should be reluctant to make a favorable finding of basic eligibility in the disability area on the basis of partial evidence, the expedited payment procedure is not provided in disability cases.

S. Rep. No. 744, *supra*, at 107.

3. Since 42 U.S.C. 405(q) was enacted in 1968, Congress has continued to express its concern that the quality of decisions should not be sacrificed to a desire to expedite

payment of benefits to eligible applicants. And although Congress repeatedly has considered the timing of ALJ hearings and has amended 42 U.S.C. 405(b) in several other respects to improve disability adjudication procedures, it consistently has rejected proposals to impose fixed deadlines in disability cases. "In view of its prolonged and acute awareness of so important an issue" (*Bob Jones University* v. *United States*, No. 81-3 (May 24, 1983), slip op. 25), Congress' refusal to do so confirms that 42 U.S.C. 405(b) does not support judicial imposition of such limitations.

In 1975, for example, the House Social Security Subcommittee held extensive hearings on the timing of Social Security administrative appeals,[20] and 60 Members cosponsored a bill (H.R. 5276, 94th Cong., 1st Sess. (1975)) to impose time limitations on all levels of review, including ALJ hearings. The Subcommittee received extensive testimony about the growing backlog of hearing requests and the resulting time between a hearing request and decision after a hearing, which then averaged more than 200 days.[21] There also was testimony regarding the ways in which the hearing system might be improved, including the hiring of additional ALJs and support staff [22] and the imposition of deadlines.[23]

After the hearings, the Subcommittee staff recommended against enactment of a law imposing deadlines on the claims process, noting that "although mandating by statute certain processing time limits might seem on

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[20] *Delays in Social Security Appeals: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 94th Cong., 1st Sess. (1975) ("*1975 Hearings*").

[21] *1975 Hearings*, *supra*, at 26, 28, 37, 39, 93, 104, 113, 146, 228, 230-232, 235, 247, 250, 259, 262, 549, 584.

[22] *1975 Hearings*, *supra*, at 39-42, 59, 62-63, 74, 228, 256-257, 439, 526, 535, 570.

[23] *1975 Hearings*, *supra*, at 23, 98, 102, 229, 246-248, 552, 575, 581-582.

the surface a desirable thing to do, such legislation might also have an adverse effect on the quality and uniformity of disability adjudication which is already somewhat suspect." [24] The Committee did not report a bill imposing time limitations, choosing instead to address the hearing backlog problem by recommending that SSI hearing examiners (who were not ALJs) be authorized to hear Title II cases on a temporary basis.[25] The legislation was enacted,[26] but congressional interest in the timing of ALJ hearings has persisted [27] and bills to limit processing times have been introduced in subsequent Sessions of Con-

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[24] Staff of the House Comm. on Ways and Means, 94th Cong., 1st Sess., *Appeals Process: Areas of Possible Administrative or Legislative Action* 1-2 (Comm. Print 1975).

[25] H.R. Rep. No. 94-679, 94th Cong., 1st Sess. 1-2, 4, 8 (1975); see also S. Rep. No. 94-550, 94th Cong., 1st Sess. 1-2, 5-6 (1975).

[26] Pub. L. No. 94-202, Section 3, 89 Stat. 1135. The hearing examiners were converted to ALJ status on a permanent basis in 1977. Pub. L. No. 95-216, Section 371, 91 Stat. 1559.

[27] For example, Representative Seiberling, the principal House sponsor of bills to impose processing deadlines, renewed his call for such deadlines soon after the 1976 law was passed. See *Disability Insurance Program: Public Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 94th Cong., 2d Sess. 341-343 (1976). See also *Administration of the Supplemental Security Income Program: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 94th Cong., 2d Sess. 111 (1976); *Administrative Law Judges, HEW Executive Level Positions, and Salary Adjustment for Director of Office of Management and Budget: Hearings Before the Subcomm. on Employee Ethics and Utilization of the House Comm. on Post Office and Civil Service*, 95th Cong., 1st Cong., 1st Sess. 10-11, 16-17 (1977); Staff of the House Comm. on Ways and Means, 95th Cong., 1st Sess., *Background Material on H.R. 5723: Conversion of Temporary Social Security ALJ's* 4 (Comm. Print 1977); Staff of the House Comm. on Ways and Means, 95th Cong., 2d Sess, *Disability Insurance—Possible Areas of Subcommittee Action* 10-12 (Comm. Print 1978); *Disability Insurance Program: 1978: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 95th Cong., 2d Sess. 15-17, 97-99 (1978).

gress. See note 32, *infra*.[28] The backlog of ALJ hearing requests and other aspects of the disability adjudication process also have been addressed repeatedly in the annual appropriations process by which Congress authorizes the expenditure of money from the Trust Funds to administer the disability program,[29] and the Appropriations Commit-

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[28] See, *e.g.*, H.R. 12466, 94th Cong., 2d Sess. (1976); H.R. 5151, 95th Cong., 1st Sess. (1977); H.R. 12672, 95th Cong., 2d Sess. (1978); H.R. 747, 96th Cong., 1st Sess. (1979); H.R. 4775, 97th Cong., 1st Sess. (1981).

[29] See *Departments of Labor and Health, Education, and Welfare Appropriations for 1978: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 95th Cong., 1st Sess. (Pt. 6) 237-238, 391-393, 398, 440, 457-459, 477-478 (1977); *Department of Labor and Health, Education, and Welfare and Related Agencies Appropriations, Fiscal Year 1978: Hearings Before the Senate Comm. on Appropriations*, 95th Cong., 1st Sess. (Pt. 3) 2353, 2372, 2373-2374, 2381 (1977); *Departments of Labor and Health, Education, and Welfare Appropriations for 1979: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 95th Cong., 2d Sess. (Pt. 6) 219-221, 484, 495-496, 502-504, 519-522 (1978); *Departments of Labor and Health, Education, and Welfare and Related Agencies Appropriations, Fiscal Year 1979: Hearings Before a Subcomm. of the Senate Comm. on Appropriations*, 95th Cong., 2d Sess. (Pt. 3) 724, 727-728, 735-736, 780-781 (1978); *Departments of Labor and Health, Education, and Welfare Appropriations for 1980: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 96th Cong., 1st Sess. (Pt. 6) 213, 218, 231-233, 291, 447, 462-463, 482, 484, 497-503 (1979); *Departments of Labor and Health, Education, and Welfare and Related Agencies Appropriations, Fiscal Year 1980: Hearings Before a Subcomm. of the Senate Comm. on Appropriations*, 96th Cong., 1st Sess. (Pt. 3) 693, 712, 718-720 (1979); *Departments of Labor, Health, Education, and Welfare, and Related Agencies Appropriations for 1981: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 96th Cong., 2d Sess. (Pt. 5) 281, 299, 341-342, 356, 556, 572, 574 (1980); *Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations, Fiscal Year 1981: Hearings Before a Subcomm. of the Senate Comm. on Appropriations*, 96th Cong., 2d Sess. (Pt. 2) 1001, 1014, 1040-1047, 1050-1051 (1980); *Departments of Labor, Health and Human Services, Edu-*

tees have monitored the problem closely.[30]

4. The Disability Amendments of 1980 further demonstrate that the existing terms of Title II of the Social Security Act cannot be read to authorize a court to impose processing deadlines on the Secretary. In Section 308 of those Amendments (94 Stat. 458), Congress directed the Secretary to submit for its consideration a report "recommending the establishment of appropriate time limitations governing decisions on claims for benefits under Title II of the Social Security Act," taking into account "both the need for expeditious processing of claims for benefits and the need to assure that all such claims will be thoroughly considered and accurately determined."[31] The enactment of this provision, looking to

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cation, and Related Agencies Appropriations for 1983: Hearings Before a Subcomm. of the House Comm. on Appropriations, 97th Cong., 2d Sess. (Pt. 5) 557-558, 635-636, 876, 896-897, 918-920, 927 (1982); *Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations, Fiscal Year 1983: Hearings Before a Subcomm. of the Senate Comm. on Appropriations*, 97th Cong., 2d Sess. (Pt. 3) 274, 330-331 (1983); *Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 1984: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 98th Cong., 1st Sess. (Pt. 5) 492, 527-528, 582-583, 606-607, 618-619, 658-659, 864, 873, 891-893, 898 (1983).

[30] See H.R. Rep. No. 97-894, 97th Cong., 2d Sess. 85-86 (1982), and S. Rep. No. 97-680, 97th Cong., 2d Sess. 94 (1982), both of which request the Secretary to report to the Committees on the problem. See also H.R. Rep. No. 97-251, 97th Cong., 1st Sess. 80 (1981) (recommending temporary authorization to hire non-ALJ examiners to reduce the hearing backlog, noting that "it appears impossible to deal with the backlog without extraordinary measures").

[31] The background materials on the 1980 amendments once again reflect an appreciation of the magnitude of the administrative problems facing SSA. See Staff of the Senate Comm. on Finance, 96th Cong., 1st Sess., *Issues Related to the Social Security Act Programs* 45-51, 123 (Comm. Print 1979); Staff of the House Comm. on Ways and Means, 96th Cong., 1st Sess., *Social Security*

the possible *future* establishment of statutory time limitations, is inconsistent with the notion that 42 U.S.C. 405(b) already implicitly contains such limitations in its reference to "reasonable notice and opportunity for a hearing." And, in fact, the Senate Report on the provision stated that "[u]nder present law and regulations there is no limit on the time taken by the Social Security Administration to adjudicate cases at any stage of adjudication."[32] The Senate Report explained:

> The provision requires the Secretary in recommending the limits to give adequate consideration to both speed and quality of adjudication. The Secretary's recommendations also should reflect the requirement added by this bill for Federal review of State allowances and denials. Congress could then evaluate the recommendations for consistency with the elements it wishes to emphasize and, if needed, take further action next year.[33]

After receiving the Secretary's report,[34] Congress did

Administrative Law Judges: Survey and Issue Paper 5, 63-69 (Comm. Print 1979); *Disability Insurance Legislation: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 88, 114, 119-120, 237-238, 241, 249 (1979).

[32] S. Rep. No. 96-408, *supra*, at 59; H.R. Conf. Rep. No. 96-944, *supra*, at 59. See also H.R. Rep. No. 96-100, *supra*, at 14. These reports all note, in identical language, that "[s]everal Federal district courts have imposed such limits at the hearing level and numerous bills have been introduced to set such limits at various levels of adjudication." There is no suggestion, however, that Congress approved of the judicial decisions. See pages 29-30, *infra*.

[33] S. Rep. No. 96-408, *supra*, at 59; see also H.R. Rep. No. 96-100, *supra*, at 14.

[34] HHS suggested time frames of 150 days for reconsideration of disability claims and 165 days for rendering a decision following a request for an ALJ hearing, subject to certain exceptions. These suggested time frames were based on then-recent processing experience, caseload projections, and quality indicators. Report of the

not take "further action" to impose deadlines. Cf. *North Haven Board of Education* v. *Bell*, 456 U.S. 512, 533-534 (1982). It still has not done so, even though it *did*

Department of Health and Human Services, *Implementation of Section 308, Public Law 96-265, Time Limitations for Decisions on Title II Benefit Claims* 1-2 (Oct. 21, 1980) ("Report"). HHS cautioned, however, that budget and staff limitations, projected workload increases, and the impact of other provisions of the Disability Amendments of 1980 (*e.g.*, pre-effectuation review of State agency disability decisions, personalized denial notices, and periodic review of persons already on disability) "mitigate against the Department's meeting its proposed time limitation objectives in every instance." Report, *supra*, at 2. HHS also noted that the circumstances of individual cases might make it difficult to meet deadlines—*e.g.*, the need to obtain sufficient medical documentation and coordinate with other agencies. *Ibid.* Finally, HHS stated that it would measure its performance against the time frames and recommend revisions if necessary. *Ibid.*

The suggested 165-day time limit for rendering ALJ decisions was based on the similar limit contained in proposed regulations that recently had been submitted by the Secretary to the district court on remand from the Sixth Circuit's decision in *Blankenship* v. *Secretary of HEW*, 587 F.2d 329 (1978). See Report, *supra*, at 2, 3. In *Blankenship*, the Sixth Circuit had reversed the district court's judgment requiring that hearings be held within 90 days of a request and remanded to afford the Secretary an opportunity to issue regulations to give substance to the "reasonable notice and opportunity for a hearing" requirement in 42 U.S.C. 405(b). 587 F.2d at 336.

On remand in *Blankenship*, the Secretary attempted to develop acceptable regulations and submitted several regulatory proposals to the district court. In the end, however, the Secretary concluded that the burgeoning and unpredictable caseload made any commitment to fixed deadlines in regulations unworkable. The Secretary therefore moved for relief from the requirement that he issue regulations and proposed instead to establish processing goals. The district court denied the Secretary's motion, ordered him to publish regulations requiring a hearing decision within 180 days of request, and required the payment of interim benefits when the time limits are not satisfied. *Blankenship* v. *Secretary of HHS*, 532 F. Supp. 739, 746-747 (W.D. Ky. 1982). The Sixth Circuit granted a stay in *Blankenship* pending the Secretary's appeal. The appeal was argued on October 8, 1982 (*Blankenship* v. *Secretary of HHS*, Nos. 82-5130 and 82-5204), but no decision has yet been rendered.

amend 42 U.S.C. 405(b) in 1982 to expedite a claimant's opportunity for a hearing in another way—by providing for an evidentiary hearing at the earlier reconsideration stage in benefit termination cases. See page 4, *supra*.[35] Indeed, the House Report on the bill that formed the basis for the 1982 legislation expressed its disapproval of hearing deadlines:

> Your Committee believes that a disability claimant is entitled to a timely hearing and decision on his appeal, but it also recognizes that the time needed before a well-reasoned and sound disability hearing decision can be made may vary widely on a case-by-case basis. (It is also interesting to note that the mean processing time for disability cases in some District courts is as high as five years and nationwide stands at an average of 12 months.) Additional time may be required in some cases because, for example, updated, comprehensive medical reports are needed from a claimant's treating physicians

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[35] Once more, the legislative history of the 1982 legislation reflects a full awareness by Congress of the backlog of requests for an ALJ hearing and the resulting period of 6 to 9 months or more that many individuals must wait to receive a hearing. H.R. Rep. No. 97-588, 97th Cong., 2d Sess. 12 (1982); S. Rep. No. 97-648, 97th Cong., 2d Sess. 20 (1982) (additional views of Sen. Long); 128 Cong. Rec. S13857 (daily ed. Dec. 3, 1982) (remarks of Sen. Heinz); *id.* at S13856 (remarks of Sen. Cohen); *id.* at S13859 (remarks of Sen. Armstrong); *id.* at S13860-S13861 (remarks of Sen. Levin); *id.* at S13862 (remarks of Sen. Pryor); *id.* at S13868 (remarks of Sen. Hawkins); *id.* at H10677 (daily ed. Dec. 21, 1982) (statement of Rep. Neal); *id.* at H10678 (remarks of Rep. Pickle); *id.* at S15963 (remarks of Sen. Armstrong); *id.* at S15964 (remarks of Sen. Dole); *id.* at S15964-S15965 (remarks of Sen. Levin). See also Staff of the Senate Comm. on Finance, 97th Cong., 2d Sess., *Staff Data and Materials Related to the Social Security Disability Insurance Program* 69-73 (Comm. Print 1982); *Social Security Appeals and Case Review Process: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 4-5, 9-11, 17-21 (1981). Representative Seiberling again urged passage of his time limits proposal (*id.* at 169-173), but Congress did not enact it.

or it is necessary to have a consulting medical specialist examine the claimant. *Establishing strict time limits for the adjudication of every case could result in incorrect determinations because time was not available to obtain needed medical evidence or to reach well-reasoned decisions in difficult cases.* SSA has recently undertaken several administrative actions to improve the timeliness of hearing decisions, such as expanding its ALJ corps and support staff, improving staff training, and installing modern equipment in hearing offices to ensure the efficient use of their resources. Your Committee will continue to emphasize and support improvements in the administrative structure and the maintenance of an adequate staff so that reasonable case-processing times exist at all levels of adjudication.[36]

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[36] H.R. Rep. No. 97-588, *supra*, at 19-20 (emphasis added). This Report was issued against the background of a report by the Staff of the Subcomm. on Social Security of the House Comm. on Ways and Means, 97th Cong., 1st Sess., *Status of the Disability Insurance Program* (Comm. Print 1981), which stated (*id.* at 13; emphasis added):

> The Subcommittee has been fully aware of the conflicting pulls of "quality" and "processing time." During the last 3 or 4 years, there have been efforts by quite a few Members of Congress to get Ways and Means and the Finance Committee to put specific time limits in the law to force the State agencies and the ALJ's to make more timely benefit decisions. *These efforts were resisted by the Committees because of the possible ramifications of less quality in decisionmaking.* In lieu of putting in such statutory requirements in the Disability Amendments of 1980, the legislation called for the Secretary to recommend appropriate time limits for the various levels of adjudication which would give "adequate consideration to both speed and quality of adjudication."

See also *id.* at 43-46. Another Staff Report of the Subcomm. on Social Security House Comm. on Ways and Means, 97th Cong., 1st Sess., *Social Security Hearings and Appeals: Pending Problems and Proposed Solutions* (Comm. Print 1981), stated (*id.* at 8; footnote omitted):

> There are a plethora of cases pending in district and circuit courts setting different time limits for hearing cases throughout the country. This has caused major disruption in the

5. In sum, Congress, with full awareness of the dimensions, causes, and complexity of the problem, consistently has eschewed fixed processing deadlines because of their potentially adverse effect on the quality of disability decisions. At every turn—in excepting disability cases from the time limitations imposed on adjudication of SSI claims by 42 U.S.C. 1383(c)(2) and from the expedited payment provisions of 42 U.S.C. 405(q), in rejecting proposals for fixed deadlines following extensive hearings in 1975, in comments made in a succession of committee and staff reports and floor debates, and in the Disability Amendments of 1980—Congress has refused to force the Secretary to act hastily in this class of cases by imposing arbitrary processing periods. Moreover, Congress by statute has now expressed its intention once again to consider the wisdom of imposing time limits, on the understanding that present law leaves the question of the scheduling of hearings to the Secretary. Cf. *Heckler* v. *Campbell*, *supra*, slip op. 8 n.10. In these circumstances, the courts below plainly erred in intruding their own view of appropriate hearing times into the Social Security disability program, and thereby improperly "engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 525 (1978).

B. The Timing Of ALJ Hearings In The Disability Program Does Not Violate 42 U.S.C. 405(b)

1. The courts below imposed hearing deadlines that Congress has rejected because they found that the Secretary's practices violated the requirement in 42 U.S.C.

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disability hearing process because ALJ's and cases must be shuttled around the country in an attempt to comply with various court orders. In a few cases benefits actually are being paid on delayed cases, as is suggested but presumably not yet ordered by the judge in the *Blankenship* case. The Social Security Administration is caught in the middle of either being in contempt of court or paying benefits without authority of law.

405(b) that claimants be provided "reasonable notice and opportunity for a hearing" (see Pet. App. 4a, 17a). This conclusion, based solely on the fact that 43% of Title II disability hearings in Vermont were not held within 90 days of a request (Pet. App. 17a), is seriously flawed.

To begin with, as shown in Part A, the courts' view that an opportunity for a hearing is not "reasonable" if the hearing is not held within 90 days is flatly inconsistent with the congressional judgment not to incorporate fixed standards of timing into the Social Security Act. But, in addition, the courts below lost sight of the fact that whether particular procedures developed by the Secretary afford claimants a "reasonable * * * opportunity for a hearing" for purposes of 42 U.S.C. 405(b) is a question of statutory interpretation arising under the Social Security Act itself; it does not turn on general notions of "reasonableness" that courts might encounter in other settings. Accordingly, the requirement in Section 405(b) that the opportunity for a hearing be "reasonable"—and any element of timing implicit in that requirement—can be given content only by reference to the overall statutory scheme and the benefits program established under that scheme.

In particular, it must be borne in mind that the claims adjudication process respondents attack is the product of the cooperative efforts of Congress and the Secretary in the amendment, oversight and administration of the Social Security Act. And it is pursuant to the authorization in that Act that Congress has made money available from the Trust Funds each year to support the claims adjudication process and thereby to define its dimensions. Congress and the Secretary have taken these actions over the last decade with full knowledge of the disability caseload and the nationwide average period required to obtain a decision following a hearing, which has never been less than 150 days. *Key Workload Indicators, supra* note 1, at 1.

"[T]his Court has been willing to assume a congressional solicitude for fair procedure" (*Califano* v.

Yamasaki, 442 U.S. 682, 693 (1979)) and has given "substantial weight" to the good faith judgment of the Secretary that the procedures she has provided "assure fair consideration of the entitlement claims of individuals" (*Mathews* v. *Eldridge*, *supra*, 424 U.S. at 349). See *Schweiker* v. *McClure*, 456 U.S. 188, 200 (1982). It is simply inconceivable that processing times that are such an entrenched feature—and direct and foreseeable consequence—of the conscientious implementation of the Social Security Act by Congress and the Secretary could be found to violate that very Act. Cf. *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 369-372 (1977). If Congress, with full appreciation of the enormous number of disability claims filed each year and the manner in which the Secretary processes them, chooses to approve a series of procedural and substantive requirements to ensure accuracy and fairness in the adjudication of those claims and to allocate a particular level of resources to accomplish that task, we submit that the normal processing period that results is by definition "reasonable" within the meaning of the statute.

Nor is there any basis for construing the phrase "reasonable * * * opportunity for a hearing" in 42 U.S.C. 405(b) to produce a contrary conclusion. In *Mathews* v. *Eldridge*, this Court held that considerations beyond the claimant's interests in a prompt hearing and receipt of benefits had to be taken into account in determining whether the procedures under review here satisfied the *constitutional* requirement of a meaningful opportunity to be heard in disability termination cases, in light of the 10 or 11 months that then generally elapsed between a request for a hearing and the ALJ's decision (424 U.S. at 341-342). A fortiori, it is necessary to consider countervailing interests and other factors Congress has made relevant under the Social Security Act in determining whether those procedures violate the *statutory* requirement of a "reasonable * * * opportunity for a hearing," in light of the considerably shorter processing times that

now prevail. Thus, in considering whether respondents' rights under 42 U.S.C. 405(b) were violated, the court of appeals in this case, as in *White* v. *Mathews*, *supra*, erred in focusing "narrowly" and "somewhat myopically" on the claimant's interest in an expeditious decision. See Note, *Judicial Resolution of Systemic Delays in Social Security Hearings*, 79 Colum. L. Rev. 959, 964, 977 (1979) ("*Systemic Delays*").[37]

The principal countervailing interests are reflected in the requirement, recently recognized by this Court, that the ALJ must "loo[k] fully into the issues" (20 C.F.R. 404.944) in every disability case even if the claimant does not adequately present all of the facts and legal arguments himself. *Heckler* v. *Campbell*, *supra*, slip op. 10-11 & n.12; *id.* at 1-2 (Brennan, J., concurring); *id.* at 1 (Marshall, J., concurring and dissenting). See also *Richardson* v. *Perales*, *supra*, 402 U.S. at 410. Complete development of the facts not only protects the claimant's narrow concerns; it also serves the broader governmental and public interest in accurate, uniform, and just determinations (see *Little* v. *Streater*, 452 U.S. 1, 14 (1981); *Lassiter* v. *Department of Social Services*, 452 U.S. 18, 27-28 (1981)), to the end that benefits from the Trust Funds are paid to eligible individuals, but to no others. Conscientious fulfillment of this obligation often requires time-consuming measures (see pages 8-10, *supra*) that might be curtailed if the complex disability determination had to be completed within too short a time frame. As the discussion in Point A demonstrates, Congress has chosen not to impose fixed deadlines on the hearing process precisely because of the fear that they might adversely affect the thoroughness and accuracy of the ALJ's inquiry into the issues. See also *Systemic Delays*, *supra*, 79 Colum. L. Rev. at 975; J. Mashaw, *Social Security*

[37] We note in this regard that if a claimant is found at any stage of the proceedings to be eligible for benefits, he is entitled to retroactive payment of such benefits for the period his claim was under review. *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 339.

Hearings and Appeals 31 (1978); J. Mashaw, *Bureaucratic Justice* 187-188 (1983).

Other values that must be taken into account by Congress and the Secretary are reflected in specific measures they have adopted in recent years to fine-tune the disability adjudication process. The medical-vocational guidelines repeatedly suggested by Congress and adopted by the Secretary in 1978 were intended to establish a procedure for the uniform, accurate, and efficient resolution of one aspect of the disability determination. *Heckler* v. *Campbell*, *supra*, slip op. 8 n.10, 9-10. Use of the guidelines may serve to expedite the decision-making process at all levels. But other measures designed to achieve uniformity and accountability—such as the provisions of the Disability Amendments of 1980 requiring Secretarial review of State agency and ALJ decisions and the periodic review of persons already receiving benefits (see pages 4-5, 6, *supra*)—may have the incidental effect of increasing processing times and the number of requests for review.

Even changes that are instituted at a particular stage to further the claimant's interest—such as the 1980 and 1982 amendments to 42 U.S.C. 405(b) requiring individualized explanation of the denial of disability benefits and an opportunity for a face-to-face hearing at the reconsideration stage in disability termination cases (see pages 3-4, *supra*)—may have the effect of increasing processing times at that stage and, as a result, postponing the succeeding levels of review. But, by the same token, these measures may actually expedite completion of the *overall* process by identifying eligible persons at an earlier stage or reducing requests for ALJ hearings by claimants who have been found ineligible by the State agency but who are satisfied with the correctness of the result. This demonstrates the complex interrelationship of the various elements of the adjudication process. The 1982 amendments also reflect the need to take into account the relative equities of different cate-

gories of claimants, for those amendments make a hearing available at the reconsideration stage only to individuals whose benefits are being terminated and who therefore have a particularly strong interest in a prompt resolution of their eligibility. Cf. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

2. These and other measures adopted by Congress and the Secretary in recent years to improve the quality of disability determinations have resulted from a constant reassessment of the various stages of the adjudicatory process, often reflecting a shifting of emphasis among the statutory goals of accuracy, fairness, uniformity, efficiency, economy, and timeliness. The relative weight to be given these factors in fashioning appropriate procedures for reviewing disability claims is a matter for Congress and the Secretary to resolve. The requirement in 42 U.S.C. 405(b) that the Secretary furnish claimants "reasonable • • • opportunity for a hearing" therefore must be read in light of the manner in which Congress and the Secretary have sought to achieve the relevant statutory goals in structuring the adjudicatory process. A court may not second-guess these determinations by enforcing its own views of what constitutes a "reasonable" system for adjudicating disability claims.

The court of appeals did not even explore these other concerns. It did not consider the degree to which the changes in the adjudicatory process wrought by the Disability Amendments of 1980—improved notice of disability denials, increased review of State agency and ALJ decisions—would affect processing times. Nor does its judgment permit accommodation of the 1982 amendments requiring a hearing at the reconsideration stage and payment of interim benefits in termination cases, which will extend the time needed for reconsideration but at the same time lessen the need to expedite a *second* hearing before an ALJ. These failings are merely symptomatic of the defects in the courts' efforts to impose rigidity on a system that demands flexibility. As the Sixth Circuit observed in *Blankenship* v. *Secretary of HEW*, 587 F.2d

329, 335 (1978), "[s]implistic and unreasonably short time limitations imposed from the outside without a thorough understanding of the reasons for the problem will frustrate welfare administration, just as it would frustrate judicial administration."

Indeed, the court of appeals did not take issue with the procedures the Secretary has adopted to implement the "reasonable" hearing requirement. In 42 U.S.C. 405(a), Congress granted the Secretary "full power and authority" to make rules and regulations to carry out the provisions of Title II and to regulate the nature, extent, and method of taking and furnishing evidence to establish the right to benefits. See also 42 U.S.C. 1302. Pursuant to this authority, the Secretary has promulgated detailed regulations and instructions that seek to assure an accurate, fair, and uniform determination of claims and provide for a reasonable distribution of cases among available ALJs. See pages 8-10, *supra*. They also take into account the question of timing by establishing priorities under which older cases and cases involving termination of benefits are to be set for a hearing first. Within these priorities, and taking into account geographical and other considerations, cases are to be scheduled as soon as possible after the prehearing workup is completed by the ALJ's staff. These regulations and instructions, issued pursuant to authority specifically delegated by Congress, are valid unless they exceed the Secretary's power under the Act or are arbitrary and capricious. *Heckler* v. *Campbell*, *supra*, slip op. 7-8. There has been no suggestion here that the Secretary's implementation of 42 U.S.C. 405(b) is invalid on either ground.

It must be presumed that the ALJs will abide by the directives the Secretary has issued, including those pertaining to the scheduling of hearings. *Schweiker* v. *McClure*, *supra*, 456 U.S. at 196 n.9, 197 n.11; *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926). In fact, the courts of appeals that have considered the question uniformly have recognized that the Secretary has made significant efforts within the limits of available

resources to manage a caseload that has quadrupled in size over the past decade (see pages 7-8, *supra*); and no court, including either court below, has suggested the existence of bad faith or dilatory motive on the part of HHS. See, *e.g.*, *Blankenship* v. *Secretary of HEW*, *supra*, 587 F.2d at 334; *Wright* v. *Califano*, 587 F.2d 345, 352-354 (7th Cir. 1978); *Caswell* v. *Califano*, 583 F.2d 9, 17-18 (1st Cir. 1978); *Barnett* v. *Califano*, *supra*, 580 F.2d at 32; *White* v. *Mathews*, *supra*, 559 F.2d at 861.

Finally, the court of appeals failed to explain how the 90-day time frame it mandated for holding ALJ hearings could be attained on a nationwide basis given the available resources and the need to maintain thorough and accurate adjudication, since the nationwide average time between a request for a hearing and the ALJ's decision currently is 185 days. See *Wright* v. *Califano*, *supra*, 587 F.2d at 353. Cf. *Hodel* v. *Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264, 283 (1981); *Open America* v. *Watergate Special Prosecution Force*, 547 F.2d 605, 615 n.17 (D.C. Cir. 1976). If ALJs were induced to deny benefit claims because insufficient evidence had been obtained within the time allowed to support a finding of disability, the result could be to increase the burden on the courts under 42 U.S.C. 405(g) and actually to *lengthen* processing times, since a greater percentage of cases predictably would be remanded for further administrative proceedings following judicial review. And in an effort to meet the deadlines under the Title II disability program, the Secretary might be forced to divert scarce resources from other Social Security programs—such as Medicare or Old Age and Survivors Insurance—that are not subject to court-imposed time limitations.[38]

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[38] Although the judgment below directly concerns only the processing of claims in Vermont, an affirmance of that judgment by this Court no doubt would rapidly lead to a further proliferation of separate decrees imposing time limits in other jurisdictions. See, *e.g.*, cases cited at Pet. 13-15 & nn. 13, 14 & 16. This process

In sum, there is no basis for concluding that the Secretary has failed to afford claimants a "reasonable * * * opportunity for a hearing" within the meaning of 42 U.S.C. 405(b).

C. The Secretary's Scheduling of Hearings Does Not Violate The Administrative Procedure Act

The court of appeals, like the district court, did not address the question whether the timing of ALJ hearings violates the Administrative Procedure Act (APA), because it found that the timing violates 42 U.S.C. 405(b) (see Pet. App. 9a n.8, 15a, 26a). Moreover, respondents, in their Brief in Opposition, did not rely upon the APA in support of the judgment below. Nevertheless, we shall briefly address the APA here because it was relied upon by the First Circuit in *Caswell* v. *Califano*, *supra*, 583 F.2d at 15.[39]

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would further balkanize the administration of what Congress plainly intended to be a uniform, nationwide program (see 42 U.S.C. (Supp. V) 421(a)(2); *Heckler* v. *Campbell*, *supra*, slip op. 7-8) as the Secretary sought to comply with the varying terms of the decrees. See Pet. 17. In addition, if processing time limits were judicially imposed in some jurisdictions but not others, the Secretary would be required to meet the applicable deadlines by reallocating resources from SSA regions that were not yet under a judicial decree (as already has occurred in several cases (see Pet. 16 n.17)), thereby prejudicing the rights of claimants in some localities and undermining the goals of fairness and uniformity that are themselves important elements of a "reasonable * * * opportunity for a hearing." See *Wright* v. *Califano*, *supra*, 587 F.2d at 352-353; *Blankenship* v. *Secretary of HEW*, *supra*, 587 F.2d at 335; *Systemic Delays*, *supra*, 79 Colum. L. Rev. at 972; Goldman, *Administrative Delay and Judicial Relief*, 66 Mich. L. Rev. 1423, 1425 (1968). Even the First and Second Circuits have acknowledged the validity of the concern that "'if the Secretary's resources truly are inadequate to the task, the more litigious of the applicants may gain an advantage over the less assertive.'" Pet. App. 7a, quoting *Caswell* v. *Califano*, *supra*, 583 F.2d at 17.

[39] Respondents' contention below that the processing times violate the Due Process Clause is without merit in light of *Mathews* v. *Eldridge* and the 1980 and 1982 amendments to the Social Security Act providing added protection for individuals whose disability benefits are terminated.

The First Circuit found support for processing deadlines in two provisions of the APA: 5 U.S.C. 555(b) and 706(1).[40] The first states: "With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it." Under 5 U.S.C. 706(1), a reviewing court is authorized to "compel agency action unlawfully withheld or unreasonably delayed." As an initial matter, we submit that the timing of disability hearings that has been so firmly established by the joint action of Congress and the Secretary pursuant to the Social Security Act and that clearly satisfies the specific procedural requirements of that Act cannot be held to violate the generally applicable provisions of the APA. See *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976). Cf. *Richardson* v. *Perales*, *supra*, 402 U.S. at 409-410. In any event, the cited provisions of the APA do not support the program-wide relief ordered by the courts below.

1. It is plain from the face of 5 U.S.C. 555(b) that the nature of an agency's obligation to conclude a matter must be informed by a "due regard for the convenience and necessity of the parties." And with particular relevance to the issue involved here, 5 U.S.C. 554(b) similarly provides that "[i]n fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives." Congress thus has recognized that the circumstances confronting a party—including the agency itself—may affect the timing of the hearing and decision. See S. Rep. No. 752, 79th Cong., 1st Sess. 17 (1945); 3 K. Davis, *Administrative Law Treatise* 52 (2d ed. 1980); U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 46 (1947) ("*Manual*") (scheduling of hearings must be consistent with the "due execution of the agency's functions").

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[40] We assume, for present purposes only, that these provisions of the APA apply to Social Security disability claims. See *Richardson* v. *Perales*, *supra*, 402 U.S. at 409.

In addition, the determination of what constitutes a "reasonable time" for purposes of 5 U.S.C. 555(b) must take into account more than the claimant's interest in a prompt disposition. Just as under 42 U.S.C. 405(b), it also is necessary to consider the reasons for the passage of time, the need to assure the quality of adjudication, and resource limitations under the particular program. See pages 33-37, *supra*. Accordingly, the language of 5 U.S.C. 554(b) and 555(b) refutes the suggestion that a violation of the APA is established by the mere passage of time prior to the holding of hearings under the disability program, when that situation results from the orderly processing of a vast number of cases pending before the agency within the limits of available resources, the ALJ's obligation to prepare each of his many pending cases carefully for its hearing,[41] and the need to coordinate the scheduling of hearings in various locations. Cf. *Morris* v. *Slappy*, No. 81-1095 (Apr. 20, 1983), slip op. 9 ("Trial judges necessarily require a great deal of latitude in scheduling trials").

The text of the judicial review provision in 5 U.S.C. 706(1), which authorizes a reviewing court to "compel agency action wrongfully withheld or unreasonably delayed," likewise does not furnish a basis for a court to impose program-wide deadlines on the adjudication of disability claims. There is no suggestion that ALJ hearings have been "wrongfully withheld" from the respondent class. Cf. *GTE Sylvania, Inc.* v. *Consumers Union*, 445 U.S. 375, 385-387 (1980). Nor can the hearings be said to have been "unreasonably delayed." The word "delay" connotes a deliberate postponement or retarding of a matter from its normal course.[42] The orderly disposition of the broad class of disability claims within the limits

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[41] At the end of May 1983, the average number of cases pending before each ALJ was 221, an all-time record. *Key Workload Indicators*, *supra* note 1, at 1.

[42] *Webster's Third New International Dictionary* 595 (4th ed. 1976).

of established procedures and existing resources does not fit this description. And even if the resulting passage of time could be said to constitute "delay," that delay, as we have explained, is not "unreasonable."

2. The legislative history of the APA is equally unsupportive of the judgment below, for it too "suggests that section 555(b) and 706(1) were designed to protect persons from an agency's intentional delay or 'dilatory attitude'" (*Systemic Delays*, *supra*, 79 Colum. L. Rev. at 965 n.30)—factors that concededly are not present here. The House Report explained that what is now 5 U.S.C. 555(b) means "that no agency shall in effect deny relief or fail to conclude a case by mere inaction, or proceed in dilatory fashion to the injury of the persons concerned. No agency should permit any person to suffer injurious consequences of unwarranted official delay." H.R. Rep. No. 1980, 79th Cong., 2d Sess. 32 (1946). See also S. Rep. No. 752, 79th Cong., 1st Sess. 19 (1945) ("no agency shall in effect deny relief or fail to conclude a case by mere inaction"). The nationwide processing of an average of more than 1.5 cases by each ALJ on each working day scarcely can be described as "mere inaction"[43] or proceeding in a "dilatory fashion." Nor, given the good faith efforts of the Secretary to improve productivity, is this a case of "unwarranted official delay."

Similarly, the legislative history of the APA described the predecessor to 5 U.S.C. 706(1) as "recogniz[ing] the right of properly interested parties to compel agencies to act where they improvidently refuse to act." H.R. Rep. No. 1980, *supra*, at 44; S. Rep. No. 752, *supra*, at 28. Here, however, the Secretary has not "refused" to decide disability cases (cf. *Costle* v. *Pacific Legal Foundation*, 445 U.S. 198, 220 n.14 (1980)) or acted "improvidently" in assuring a thorough and accurate evaluation of claims with full use of available resources.

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[43] Conducting the hearing itself is not the only "action" by the Secretary in these cases; the numerous steps that must be taken in preparation for the hearing (see pages 8-10, *supra*) dispel any suggestion of prolonged "inaction" in the interim.

It also is significant that the Attorney General's *Manual* on the APA [44] states that what is now 5 U.S.C. 706 (1) "appears to be a particularized restatement of existing judicial practice" in the issuance of writs of mandamus pursuant to the All Writs Act, 28 U.S.C. (1946 ed.) 377, now codified at 28 U.S.C. 1651. *Manual, supra*, at 108, citing, *inter alia*, *Roche* v. *Evaporated Milk Association*, 319 U.S. 21 (1943). Mandamus would not lie to compel a district judge to act on a particular case solely because of the passage of the time required by the judge and the parties to prepare the case and to bring it to trial in the normal course on the court's crowded docket. That relief would be available only if the court affirmatively and substantially departed from its normal course in the particular case—*i.e.*, if it "persistently and without reason refuse[d] to adjudicate a case properly before it" (*Will* v. *Calvert Fire Insurance Co.*, 437 U.S. 655, 661-662 (1978) (opinion of Rehnquist, J.). See also *Roche* v. *Evaporated Milk Association*, *supra*, 319 U.S. at 27 ("refusal" to adjudicate issues). It would, accordingly, be unthinkable for an appellate court, in granting mandamus relief, to require that *all* cases pending before a district judge be disposed of within a fixed time frame—at least absent the most exceptional circumstances. Although we do not suggest that mandamus doctrine is uniformly applicable to 5 U.S.C. 706(1), the Attorney General's contemporaneous interpretation of 5 U.S.C. 706(1) as a "particularized restatement" of mandamus principles at the very least weighs heavily against a reviewing court's exercising a comparably instrusive control over an agency's docket and its scheduling of cases for a hearing.

3. Thus, the text and legislative history of the APA do not support the ordering of program-wide deadlines absent a showing of pervasive bad faith. That Act was

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[44] This Court has given weight to the *Manual* in interpreting the APA because it embodies the contemporaneous construction of the Act by the Executive Department involved in its drafting. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 n.31 (1979); *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, *supra*, 435 U.S. at 546.

intended instead to furnish a more tailored remedy, available upon a party's showing that the handling of a particular case departs significantly from agency norms without justification, requires repetitive proceedings serving no legitimate agency purpose, or otherwise constitutes the effective equivalent of a deliberate and substantial postponement of action. See *Wright* v. *Califano*, *supra*, 587 F.2d at 352-353; *FTC* v. *J. Weingarten, Inc.*, 336 F.2d 687, 691-692 (5th Cir. 1964), cert. denied, 380 U.S. 908 (1965); *Deering-Milliken, Inc.* v. *Johnston*, 295 F.2d 856, 867-868 (4th Cir. 1961); Goldman, *supra*, 66 Mich. L. Rev. at 1429; *Systemic Delays*, *supra*, 79 Colum. L. Rev. at 966-968, 977-982; Note, *Judicial Acceleration of the Administrative Process: The Right To Relief from Unduly Protracted Proceedings*, 72 Yale L.J. 574-575 (1963). No such showing has been made here.

D. The Courts Below Erred In Extending Processing Deadlines To The Reconsideration Stage

Our submission that the courts below erred in imposing deadlines on the processing of claims at the ALJ hearing stage equally demonstrates that the courts were mistaken in extending processing deadlines to the reconsideration stage as well. As we have explained (see pages 19-31, *supra*), Congress consistently has declined to incorporate deadlines in the Act for *any* stage of the proceedings, including reconsideration, and instead has enacted statutory provisions and suggested solutions inconsistent with court-imposed deadlines.

The extension of deadlines to the reconsideration stage is particularly inappropriate in view of the fact that the reconsideration function is carried out by State agencies, whose day-to-day activities are not subject to the Secretary's direct control. To meet this problem, in the Disability Amendments of 1980, Congress authorized the Secretary to promulgate regulations specifying "in such detail as he deems appropriate" performance standards and procedures to be followed by the State agencies "in order to assure effective and uniform administration of

the disability program throughout the United States." 42 U.S.C. (Supp. V) 421(a)(2). These regulations "may," but need not, specify performance criteria for the accuracy of decisions and "the time periods within which determinations must be made" (42 U.S.C. (Supp. V) 421(a)(2)(C)). Moreover, Congress provided a specific means of enforcing these standards: it authorized the Secretary to assume the State's functions—after a 180-day waiting period—if she finds after a hearing that the State agency has failed to comply with the standards. 42 U.S.C. (Supp. V) 421(b). In the exercise of her discretion under this Section, the Secretary has elected to impose time limits on initial determinations by State agencies (20 C.F.R. 404.1640 *et seq.*), but not on reconsiderations. The Secretary's omission of fixed deadlines at the reconsideration stage plainly is not an abuse of discretion, in view of Congress' express reservations about the wisdom of deadlines. The court of appeals' imposition of processing deadlines directly on the State agencies therefore is at odds with the explicit congressional judgment to leave the question of such deadlines and their enforcement to the Secretary as part of her general oversight of the State's performance.[45]

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[45] Respondents complain (Br. in Opp. 4) of what they term "gaps of unexplained delay" in the processing of the 77 cases selected as a sample of reconsideration cases in Vermont (see page 12, *supra*). This complaint is based on a compilation of a log for each of the 77 sample cases that simply notes when certain discrete actions were taken in the particular case (*e.g.*, file requested from SSA by the State agency, file received, consultative examination requested, additional evidence requested, determination signed by State agency examiner or State agency physician, "systems input," etc.). See J.A. 105-149, 192-195. These summaries do not purport to explain what transpired *between* the particular milestones listed, the complexity of particular cases, or the caseload confronting the employees involved, and it simply is not possible to reconstruct those facts long after a case has been finally adjudicated. Such "gaps" in explanation by the agency, when considered with a presumption of regularity, do not show that the agency has performed in an unacceptable fashion. See *INS* v. *Miranda*, No. 82-29 (Nov. 8, 1982), slip op. 4. Far less do they carry respondents' burden of proving

Finally, the ability of a State agency to comply with the 90-day deadline adopted by the courts below—a figure based on the district court's review of cases reconsidered between 1977 and 1980—is rendered more doubtful by the provisions of the Disability Amendments of 1980 requiring new individualized notice and pre-effectuation review by SSA of State reconsideration decisions. And beginning no later than January 1, 1984, evidentiary hearings must be held at the reconsideration stage in disability termination cases, which obviously will add to the time needed at that stage. These legislative developments, which the processing deadlines imposed by the lower courts fail to accommodate, clearly illustrate the danger of judicial intervention in an area more appropriately designed for monitoring and regulation by Congress and the Secretary.

II. THE DISTRICT COURT WAS WITHOUT AUTHORITY TO ORDER THE PAYMENT OF INTERIM BENEFITS TO INDIVIDUALS WHOSE CLAIMS ARE NOT PROCESSED WITHIN THE JUDICIALLY IMPOSED DEADLINES

If, contrary to our submission in Point I, the district court properly imposed fixed deadlines on the completion of the reconsideration stage and the holding of ALJ hearings in Social Security disability cases, that court nevertheless was without authority to order the payment of interim benefits to individuals whose claims are not processed within those deadlines.

This Court repeatedly has stressed that "the United States, as sovereign, 'is immune from suit save as it consents to be sued * * * and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981), quoting *United States* v. *Testan*,

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their entitlement to the extraordinary relief ordered below. Congress has now made clear that any defects in a State agency's administration of the disability program are for the Secretary to correct. 42 U.S.C. (Supp. V) 421(a) and (b).

424 U.S. 392, 399 (1976), and *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). Consistent with this principle, a court may not award monetary relief against the federal government absent a congressional enactment waiving the United States' sovereign immunity. *United States* v. *Mitchell*, No. 81-1748 (June 27, 1983), slip op. 6; *Army & Air Force Exchange Service* v. *Sheehan*, 456 U.S. 728, 738-740 (1982); *United States* v. *Testan*, *supra*; *Pine Hill Coal Co.* v. *United States*, 259 U.S. 191, 196 (1922). Cf. U.S. Const., Art. I, § 9, Cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law * * *").

The conditions for the payment of benefits from the Social Security Trust Funds are set forth in 42 U.S.C. 405(i). That Section permits payment only upon a "final decision" by the Secretary or "final judgment" by a court that a person is "entitled" to benefits. Under 42 U.S.C. (Supp. V) 423(a)(1), an individual is "entitled" to payment of disability insurance benefits only if he "is under a disability" and satisfies other eligibility criteria. Any member of the respondent class to whom interim disability benefits must be paid under the judgment below by definition will *not* have received the requisite "final decision" by the Secretary (or the State agency) establishing his eligibility. The interim benefit provisions of the judgment below therefore violate 42 U.S.C. 405(i).

In *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), another Social Security case, this Court reiterated " 'the duty of all courts to observe the conditions defined by Congress for charging the public treasury.' " 450 U.S. at 788, quoting *Federal Crop Insurance Co.* v. *Merrill*, 332 U.S. 380 (1947). The court of appeals sought to avoid the force of *Hansen* by characterizing the interim benefits requirement as flowing from the "district court's inherent powers to fashion a remedy" (Pet. App. 8a). But, as we have said, the courts of the United States have no "inherent power" to order the payment of money from the federal Treasury whenever they find a violation of a statute. *United States* v. *Testan*, *supra*, 424 U.S. at 401,

403. Moreover, the remedy a court may fashion for a violation of the requirement in 42 U.S.C. 405(b) that an individual be provided "reasonable notice and opportunity for a hearing" surely is limited by the conditions on the payment of money from the Trust Funds contained in Subsection (i) of that same statutory provision. Compliance with those conditions is not excused by the mere passage of time in processing a claim. Cf. *INS* v. *Miranda*, No. 82-29 (Nov. 8, 1982).

In addition, the decision below ignores the fact that Congress has addressed the interim benefits issue and has chosen not to make such benefits generally available in disability cases solely because of the passage of time in the administrative review process. As we have explained (see page 22, *supra*), Congress enacted 42 U.S.C. 405(q) in 1968 to provide a mechanism for the expedited payment of benefits when a claim has not been finally resolved within a specified period but the claimant has made a prima facie showing of entitlement. The Senate Report explicitly stated, however, that "the Secretary should not be forced into making doubtful payments merely because of the passage of time" and that Section 405(q) therefore requires the Secretary to be "confident of the validity of the claim" before an interim payment may be made. S. Rep. No. 744, *supra*, at 106. What is more, Congress expressly excluded *disability* cases from this expedited payment provision (42 U.S.C. 405(q)(5)) because State agencies are involved in the process, "lengthy and extensive development of facts of a medical nature is often required," and "the Secretary should be reluctant to make a favorable ruling of basic eligibility in the disability area on the basis of partial evidence" (S. Rep. No. 744, *supra*, at 107). The award of interim benefits by the courts below countermands this deliberate legislative judgment.[46]

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[46] Even in situations not implicating sovereign immunity, where the federal courts may have greater "power to grant relief that is not expressly authorized by statute," the Court has stressed that "such power is to be exercised in light of relevant policy determinations made by the Congress." *Bush* v. *Lucas*, No. 81-469 (June 13, 1983), slip op. 6.

In 1982, Congress did enact *temporary* authorization for the payment of interim benefits through the ALJ stage to an individual whose benefits are to be terminated on the basis of a decision by the State agency that he no longer is under a disability. See page 4, *supra*. This provision was enacted because of Congress' special concern that individuals who may have become dependent upon their disability benefits might experience hardship while they pursue administrative review of the State's termination decision. See materials cited in note 35, *supra*. Any member of the respondent class covered by this provision of course may receive benefits under it. But because Congress has demonstrated that when it intends to allow payment of interim benefits pending administrative review it has expressly so provided, it is now especially clear that the award of interim benefits to other persons—such as those whose new applications for disability benefits have been denied by the State agency—is barred by the Act.[47] The district court's interim benefits order therefore cannot stand.[48]

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[47] In fact, the 1982 legislation permitting interim benefit payments only in termination cases was enacted on the basis of Congress' understanding that "[p]resent law does not authorize the payment of Social Security benefits from the Social Security trust funds until a final decision is made on an application for benefits" and its disagreement with judicial decisions requiring payment of interim benefits in disability cases generally. H.R. Rep. No. 97-588, *supra*, at 19. See also note 36, *supra*.

[48] Although the district court's order permits recoupment of the interim benefits if the claimant is later found to be ineligible (Pet. App. 35a), this "theoretical right of the Secretary to recover undeserved benefits [would not] result, as a practical matter, in any substantial offset to the added outlay of public funds." *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 347.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

STATUTORY PROVISIONS INVOLVED

A. SOCIAL SECURITY PROVISIONS:

1. Section 308 of the Social Security Disability Amendment of 1980, Pub. L. No. 96-265, 94 Stat. 458, 42 U.S.C. (Supp. V) 401 note, provides:

> TIME LIMITATIONS FOR DECISIONS ON BENEFIT CLAIMS
>
> SEC. 308. The Secretary of Health and Human Services shall submit to the Congress, no later than July 1, 1980, a report recommending the establishment of appropriate time limitations governing decisions on claims for benefits under title II of the Social Security Act. Such report shall specifically recommend—
>
> (1) the maximum period of time (after application for a payment under such title is filed) within which the initial decision of the Secretary as to the rights of the applicant should be made;
>
> (2) the maximum period of time (after application for reconsideration of any decision described in paragraph (1) is filed) within which a decision of the Secretary on such reconsideration should be made;
>
> (3) the maximum period of time (after a request for a hearing with respect to any decision described in paragraph (1) is filed) within which a decision of the Secretary upon such hearing (whether affirming, modifying, or reversing such decision) should be made; and
>
> (4) the maximum period of time (after a request for review by the Appeals Council with respect to any decision described in paragraph (1) is made) within which the decision of the Secretary upon such review (whether affirming, modifying, or reversing such decision) should be made.

In determining the time limitations to be recommended, the Secretary shall take into account both the need for expeditious processing of claims for benefits and the need to assure that all such claims will be thoroughly considered and accurately determined.

2. Section 205 of the Social Security Act, as codified at 42 U.S.C. (& Supp. V) 405, provides in relevant part:

§ 405. Evidence, procedure, and certification for payments

(a) Rules and regulations; procedures

The Secretary shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.

(b) Administrative determination of entitlement to benefits statement; findings of fact; hearings; investigations

[(1)*] The Secretary is directed to make findings of fact, and decisions as to the rights of any indi-

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* In Section 4(a) of Pub. L. No. 97-455, 96 Stat. 2499, Congress amended Section 205(b) of the Act by inserting "(1)" before the text of Subsection (b) as it then read and adding at the end of Subsection (b) a new paragraph (2), which is set off here in brackets because it has not yet been codified at 42 U.S.C. 405(b). Section 4(b) of Pub. L. No. 97-455, 96 Stat. 2500, provides that these amendments to Section 205(b) of the Act shall apply to any request for reconsideration made on or after such date as the Secretary may specify, but in any event no later than January 1, 1984.

vidual applying for a payment under this subchapter. Any such decision by the Secretary which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Secretary's determination and the reason or reasons upon which it is based. Upon request by any such individual or upon request by a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, husband, widower, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Secretary has rendered, he shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse his findings of fact and such decision. Any such request with respect to such a decision must be filed within sixty days after notice of such decision is received by the individual making such request. The Secretary is further authorized, on his own motion, to hold such hearings and to conduct such investigations and other proceedings as he may deem necessary or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, he may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Secretary even though inadmissible under rules of evidence applicable to court procedure.

[(2) In any case where—

(A) an individual is a recipient of disability insurance benefits, or of child's, widow's, or widower's insurance benefits based on disability,

(B) the physical or mental impairment on the basis of which such benefits are payable is found

to have ceased, not to have existed, or to no longer be disabling, and

(C) as a consequence of the finding described in subparagraph (B), such individual is determined by the Secretary not to be entitled to such benefits,

any reconsideration of the finding described in subparagraph (B), in connection with a reconsideration by the Secretary (before any hearing under paragraph (1) on the issue of such entitlement) of his determination described in subparagraph (C), shall be made only after opportunity for an evidentiary hearing, with regard to the finding described in subparagraph (B), which is reasonably accessible to such individual. Any reconsideration of a finding described in subparagraph (B) may be made either by the State agency or the Secretary where the finding was originally made by the State agency, and shall be made by the Secretary where the finding was originally made by the Secretary. In the case of a reconsideration by a State agency of a finding described in subparagraph (B) which was originally made by such State agency, the evidentiary hearing shall be held by an adjudicatory unit of the State agency other than the unit that made the finding described in subparagraph (B). In the case of a reconsideration by the Secretary of a finding described in subparagraph (B) which was originally made by the Secretary, the evidentiary hearing shall be held by a person other than the person or persons who made the finding described in subparagraph (B).]

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(i) Certification for payment

Upon final decision of the Secretary or upon final judgment of any court of competent jurisdiction, that any person is entitled to any payment or payments under this subchapter, the Secretary shall certify to

the Managing Trustee the name and address of the person so entitled to receive such payment or payments, the amount of such payment or payments, and the time at which such payment or payments should be made, and the Managing Trustee, through the Division of Disbursement of the Treasury Department, and prior to any action thereon by the General Accounting Office, shall make payment in accordance with the certification of the Secretary * * *: *Provided*, That where a review of the Secretary's decision is or may be sought under subsection (g) of this section the Secretary may withhold certification of payment pending such review. The Managing Trustee shall not be held personally liable for any payment or payments made in accordance with a certification by the Secretary.

* * * * *

(q) Expedited benefit payments

(1) The Secretary shall establish and put into effect procedures under which expedited payment of monthly insurance benefits under this subchapter will, subject to paragraph (4) of this subsection, be made as set forth in paragraphs (2) and (3) of this subsection.

(2) In any case in which—

(A) an individual makes an allegation that a monthly benefit under this subchapter was due him in a particular month but was not paid to him, and

(B) such individual submits a written request for the payment of such benefit—

(i) in the case of an individual who received a regular monthly benefit in the month preceding the month with respect to which such allegation is made, not less than 30 days after the 15th day of the month with respect to which such allegation is

made (and in the event that such request is submitted prior to the expiration of such 30-day period, it shall be deemed to have been submitted upon the expiration of such period), and

(ii) in any other case not less than 90 days after the later of (I) the date on which such benefit is alleged to have been due, or (II) the date on which such individual furnished the last information requested by the Secretary (and such written request will be deemed to be filed on the day on which it was filed, or the ninetieth day after the first day on which the Secretary has evidence that such allegation is true, whichever is later),

the Secretary shall, if he finds that benefits are due, certify such benefits for payment, and payment shall be made within 15 days immediately following the date on which the written request is deemed to have been filed.

(3) In any case in which the Secretary determines that there is evidence, although additional evidence might be required for a final decision, that an allegation described in paragraph (2)(A) is true, he may make a preliminary certification of such benefit for payment even though the 30-day or 90-day periods described in paragraph (2)(B)(i) and (B)(ii) have not elapsed.

(4) Any payment made pursuant to a certification under paragraph (3) of this subsection shall not be considered an incorrect payment for purposes of determining the liability of the certifying or disbursing officer.

(5) For purposes of this subsection, benefits payable under section 428 of this title shall be treated as monthly insurance benefits payable under this subchapter. However, this subsection shall not apply

with respect to any benefit for which a check has been negotiated, or with respect to any benefit alleged to be due under either section 423 of this title, or section 402 of this title to a wife, husband, or child of an individual entitled to or applying for benefits under section 423 of this title, or to a child who has attained age 18 and is under a disability, or to a widow or widower on the basis of being under a disability.

3. Section 221 of the Social Security Act, as codified at 42 U.S.C. (Supp. V) 421, provides in relevant part:

§ 421. Disability determinations

(a) State agencies

(1) In the case of any individual, the determination of whether or not he is under a disability (as defined in section 416(i) or 423(d) of this title) and of the day such disability began, and the determination of the day on which such disability ceases, shall be made by a State agency, notwithstanding any other provision of law, in any State that notifies the Secretary in writing that it wishes to make such disability determinations commencing with such month as the Secretary and the State agree upon, but only if (A) the Secretary has not found, under subsection (b)(1) of this section, that the State agency has substantially failed to make disability determinations in accordance with the applicable provisions of this section or rules issued thereunder, and (B) the State has not notified the Secretary, under subsection (b)(2) of this section, that it does not wish to make such determinations. If the Secretary once makes the finding described in clause (A) of the preceding sentence, or the State gives the notice referred to in clause (B) of such sentence, the Secretary may thereafter determine whether (and, if so, beginning with which month and under what condi-

tions) the State may again make disability determinations under this paragraph.

(2) The disability determinations described in paragraph (1) made by a State agency shall be made in accordance with the pertinent provisions of this subchapter and the standards and criteria contained in regulations or other written guidelines of the Secretary pertaining to matters such as disability determinations, the class or classes of individuals with respect to which a State may make disability determinations (if it does not wish to do so with respect to all individuals in the State), and the conditions under which it may choose not to make all such determinations. In addition, the Secretary shall promulgate regulations specifying, in such detail as he deems appropriate, performance standards and administrative requirements and procedures to be followed in performing the disability determination function in order to assure effective and uniform administration of the disability insurance program throughout the United States. The regulations may, for example, specify matters such as—

(A) the administrative structure and the relationship between various units of the State agency responsible for disability determinations,

(B) the physical location of and relationship among agency staff units, and other individuals or organizations performing tasks for the State agency, and standards for the availability to applicants and beneficiaries of facilities for making disability determinations,

(C) State agency performance criteria, including the rate of accuracy of decisions, the time periods within which determinations must be made, the procedures for and the scope of review by the Secretary, and, as he finds appropriate, by the State, of its performance in individual cases and in classes of cases, and rules

governing access of appropriate Federal officials to State offices and to State records relating to its administration of the disability determination function,

(D) fiscal control procedures that the State agency may be required to adopt, and

(E) the submission of reports and other data, in such form and at such time as the Secretary may require, concerning the State agency's activities relating to the disability determination.

Nothing in this section shall be construed to authorize the Secretary to take any action except pursuant to law or to regulations promulgated pursuant to law.

(b) Determinations by Secretary

(1) If the Secretary finds, after notice and opportunity for a hearing, that a State agency is substantially failing to make disability determinations in a manner consistent with his regulations and other written guidelines, the Secretary shall, not earlier than 180 days following his finding, and after he has complied with the requirements of paragraph (3), make the disability determinations referred to in subsection (a)(1) of this section.

(2) If a State, having notified the Secretary of its intent to make disability determinations under subsection (a)(1) of this section, no longer wishes to make such determinations, it shall notify the Secretary in writing of that fact, and, if an agency of the State is making disability determinations at the time such notice is given, it shall continue to do so for not less than 180 days, or (if later) until the Secretary has complied with the requirements of paragraph (3). Thereafter, the Secretary shall make the disability determinations referred to in subsection (a)(1) of this section.

(3)(A) The Secretary shall develop and initiate all appropriate procedures to implement a plan with respect to any partial or complete assumption by the Secretary of the disability determination function from a State agency, as provided in this section, under which employees of the affected State agency who are capable of performing duties in the disability determination process for the Secretary shall, notwithstanding any other provision of law, have a preference over any other individual in filling an appropriate employment position with the Secretary (subject to any system established by the Secretary for determining hiring priority among such employees of the State agency) unless any such employee is the administrator, the deputy administrator, or assistant administrator (or his equivalent) of the State agency, in which case the Secretary may accord such priority to such employee.

(B) The Secretary shall not make such assumption of the disability determination function until such time as the Secretary of Labor determines that, with respect to employees of such State agency who will be displaced from their employment on account of such assumption by the Secretary and who will not be hired by the Secretary to perform duties in the disability determination process, the State has made fair and equitable arrangements to protect the interests of employees so displaced. Such protective arrangements shall include only those provisions which are provided under all applicable Federal, State and local statutes including, but not limited to, (i) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective-bargaining agreements; (ii) the continuation of collective-bargaining rights; (iii) the assignment of affected employees to other jobs or to retraining programs; (iv) the protection of individual employees against a worsening of their positions with respect to their employment;

(v) the protection of health benefits and other fringe benefits; and (vi) the provision of severance pay, as may be necessary.

(c) Review of determination by Secretary

(1) The Secretary may on his own motion or as required under paragraphs (2) and (3) review a determination, made by a State agency under this section, that an individual is or is not under a disability (as defined in section 416(i) or 423(d) of this title) and, as a result of such review, may modify such agency's determination and determine that such individual either is or is not under a disability (as so defined) or that such individual's disability began on a day earlier or later than that determined by such agency, or that such disability ceased on a day earlier or later than that determined by such agency. A review by the Secretary on his own motion of a State agency determination under this paragraph may be made before or after any action is taken to implement such determination.

(2) The Secretary (in accordance with paragraph (3)) shall review determinations, made by State agencies pursuant to this section, that individuals are under disabilities (as defined in section 416(i) or 423(d) of this title). Any review by the Secretary of a State agency determination under this paragraph shall be made before any action is taken to implement such determination.

(3) In carrying out the provisions of paragraph (2) with respect to the review of determinations, made by State agencies pursuant to this section, that individuals are under disabilities (as defined in section 416(i) or 423(d) of this title), the Secretary shall review—

(A) at least 15 percent of all such determinations made by State agencies in the fiscal year 1981,

(B) at least 35 percent of all such determinations made by State agencies in the fiscal year 1982, and

(C) at least 65 percent of all such determinations made by State agencies in any fiscal year after the fiscal year 1982.

(d) Hearings and judicial review

Any individual dissatisfied with any determination under subsection (a), (b), (c), or (g) of this section shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title with respect to decisions of the Secretary's final decision after such hearing as is provided in section 405(g) of this title.

* * * * *

(h) [*] Periodic reviews of eligibility

[(1)**] In any case where an individual is or has been determined to be under a disability, the case shall be reviewed by the applicable State agency or the Secretary (as may be appropriate), for purposes of continuing eligibility, at least once every 3 years[, subject to paragraph (2)]; except that where a finding has been made that such disability is permanent, such reviews shall be made at such times as the Secretary determines to be appropriate. Reviews of cases under the preceding sentence shall be in addition to, and shall not be considered as a substitute for, any other reviews which are required or pro-

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* Section 221(i) was editorially designated as Subsection (h) of 42 U.S.C. (Supp. V) 421 because no Subsection (h) of Section 221 of the Act was enacted. See 42 U.S.C. (Supp. V) 421 note.

** In Section 3 of Pub. L. No. 97-455, 96 Stat. 2499, Congress amended Section 221(i) by inserting "(1)" before the text of Subsection (i) as it then read and adding at the end of Subsection (i) a new paragraph (2), which is set off in brackets here because it has not yet been codified at 42 U.S.C. 421(h). See note *, *supra*.

vided for under or in the administration of this subchapter.

[(2) The requirement of paragraph (1) that cases be reviewed at least every 3 years shall not apply to the extent that the Secretary determines, on a State-by-State basis, that such requirement should be waived to insure that only the appropriate number of such cases are reviewed. The Secretary shall determine the appropriate number of cases to be reviewed in each State after consultation with the State agency performing such reviews, based upon the backlog of pending reviews, the projected number of new applications for disability insurance benefits, and the current and projected staffing levels of the State agency, but the Secretary shall provide for a waiver of such requirement only in the case of a State which makes a good faith effort to meet proper staffing requirements for the State agency and to process case reviews in a timely fashion. The Secretary shall report annually to the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives with respect to the determinations made by the Secretary under the preceding sentence.]

4. Section 304(g) of the Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 94 Stat. 456, 42 U.S.C. (Supp. V) 421 note, provides:

> The Secretary of Health and Human Services shall implement a program of reviewing, on his own motion, decisions rendered by administrative law judges as a result of hearings under section 221(d) of the Social Security Act, and shall report to the Congress by January 1, 1982, on his progress.

5. Section 223 of the Social Security Act, as codified at 42 U.S.C. (& Supp. V) 423, provides in relevant part:

§ 423. Disability insurance benefits payments

(a) Disability insurance benefits

(1) Every individual who—

(A) is insured for disability insurance benefits (as determined under subsection (c)(1) of this section),

(B) has not attained the age of sixty-five,

(C) has filed application for disability insurance benefits, and

(D) is under a disability (as defined in subsection (d) of this section)

shall be entitled to a disability insurance benefit (i) for each month beginning with the first month after his waiting period (as defined in subsection (c)(2) of this section) in which he becomes so entitled to such insurance benefits, or (ii) for each month beginning with the first month during all of which he is under a disability and in which he becomes so entitled to such insurance benefits, but only if he was entitled to disability insurance benefits which terminated, or had a period of disability (as defined in section 416(i) of this title) which ceased, within the 60-month period preceding the first month in which he is under such disability, and ending with the month preceding whichever of the following months is the earliest: the month in which he dies, the month in which he attains age 65, or, subject to subsection (e) of this section, the termination month. * * *.

* * * * *

[(g) Continued payment of disability benefits durduring appeal

(1) In any case where—

(A) an individual is a recipient of disability insurance benefits, or of child's, widow's, or widower's insurance benefits based on disability,

(B) the physical or mental impairment on the basis of which such benefits are payable is found to have ceased, not to have existed, or to no longer be disabling, and as a consequence such individual is determined not to be entitled to such benefits, and

(C) a timely request for a hearing under section 221(d), or for an administrative review prior to such hearing, is pending with respect to the determination that he is not so entitled,

such individual may elect (in such manner and form and within such time as the Secretary shall by regulations prescribe) to have the payment of such benefits, and the payment of any other benefits under this Act based on such individual's wages and self-employment income (including benefits under title XVIII), continued for an additional period beginning with the first month beginning after the date of the enactment of this subsection for which (under such determination) such benefits are no longer otherwise payable, and ending with the earlier of (i) the month preceding the month in which a decision is made after such a hearing, (ii) the month preceding the month in which no such request for a hearing or an administrative review is pending, or (iii) June 1984.

(2)(A) If any individual elects to have the payment of his benefits continued for an additional period under paragraph (1), and the final decision of the Secretary affirms the determination that he is not entitled to such benefits, any benefits paid under this title pursuant to such election (for months in such additional period) shall be considered overpayments for all purposes of this title, except as otherwise provided in subparagraph (B).

(B) If the Secretary determines that the individual's appeal of his termination of benefits was made

in good faith, all of the benefits paid pursuant to such individual's election under paragraph (1) shall be subject to waiver consideration under the provisions of section 204.

(3) The provisions of paragraphs (1) and (2) shall apply with respect to determinations (that individuals are not entitled to benefits) which are made—

(A) on or after the date of enactment of this subsection, or prior to such date but only on the basis of a timely request for a hearing under section 221(d), or for an administrative review prior to such hearing, and

(B) prior to October 1, 1983.*].

6. Section 1631(c) of the Social Security Act, as codified at 42 U.S.C. (& Supp. V) 1383(c), provides:

§ 1383. Procedure for payment of benefits

* * * * *

(c) Hearing to determine eligibility or amount of benefits; time within which to request hearing; time for determinations of Secretary pursuant to hearing; judicial review

(1) The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for payment under this subchapter. Any such decision by the Secretary which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Secretary's determination and the reason or reasons upon which it is based. The Secretary shall provide reasonable notice and opportunity for a

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*** In Section 2 of the Pub. L. No. 97-455, 96 Stat. 2498-2499, Congress amended Section 223 of the Act by adding at the end thereof a new Subsection (g), which is set off in brackets here because it has not yet been codified at 42 U.S.C. 423(g).**

hearing to any individual who is or claims to be an eligible individual or eligible spouse and is in disagreement with any determination under this subchapter with respect to eligibility of such individual for benefits, or the amount of such individual's benefits, if such individual requests a hearing on the matter in disagreement within sixty days after notice of such determination is received, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing affirm, modify, or reverse his findings of fact and such decision. The Secretary is further authorized, on his own motion, to hold such hearings and to conduct such investigations and other proceedings as he may deem necessary or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, he may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Secretary even though inadmissible under the rules of evidence applicable to court procedure.

(2) Determination on the basis of such hearing, except to the extent that the matter in disagreement involves a disability (within the meaning of section 1382c(a)(3) of this title), shall be made within ninety days after the individual requests the hearing as provided in paragraph (1).

(3) The final determination of the Secretary after a hearing under paragraph (1) shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Secretary's final determinations under section 405 of this title.

B. ADMINISTRATIVE PROCEDURE ACT:

1. 5 U.S.C. 554(b) provides:

§ 554. Adjudication

* * * * *

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

2. 5 U.S.C. 555(b) provides:

§ 555. **Ancillary matters**

* * * * *

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. **This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.**

3. 5 U.S.C. 706 provides:

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

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